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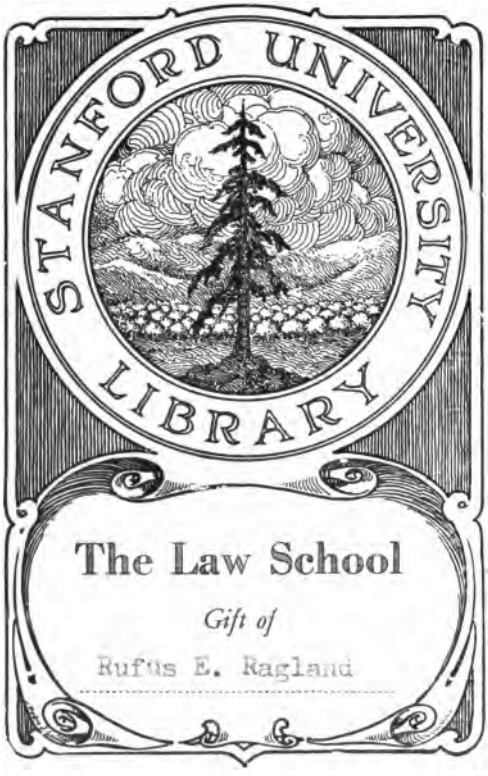
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MILLS'
IRRIGATION MANUAL

FOR

Lawyers, Irrigation Officers, Engineers and Water Users

BEING A TREATISE
ON THE

LAW OF IRRIGATION

TOGETHER WITH THE

STATUTES AND FORMS

OF THE FOLLOWING
SEVENTEEN STATES AND TERRITORIES

ARIZONA, CALIFORNIA, COLORADO, KANSAS, IDAHO,
MONTANA, NEBRASKA, NEW MEXICO, NEVADA,
NORTH DAKOTA, OKLAHOMA, OREGON,
SOUTH DAKOTA, TEXAS, UTAH,
WASHINGTON AND
WYOMING

By J. WARNER MILLS, of the Denver Bar,
Author of
MILLS' ANNOTATED STATUTES OF COLORADO, MILLS' ANNOTATED CODE, MILLS' COLORADO DIGEST, ETC.

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PREFACE.

This Manual is intended as a practical book on Irrigation, not only for lawyers, but for irrigation officers of every grade and for hydraulic engineers and water users as well.

In addition to the irrigation statutes and forms of the states and territories named below, the statutes and forms of the United States Government are also given in full, including those upon irrigation pertaining to the Philippine Islands.

The treatise portion of the work is divided into nine parts, and in this treatise no pains have been spared to bring before the reader all the irrigation decisions of the following seventeen arid and semi-arid states and territories, to wit:

Arizona	1-7 Arizona		1-85 Pac.
California	1-148 California		1-85 Pac.
Colorado	1-34 Colo., 1-20 Colo. App.		1-85 Pac.
Idaho	1-9 Idaho		1-85 Pac.
Kansas	1-70 Kansas		1-85 Pac.
Montana	1-31 Montana		1-85 Pac.
Nebraska	1-69 Nebraska		1-106 N. W.
Nevada	1-27 Nevada		1-85 Pac.
New Mexico	1-11 New Mexico		1-85 Pac.
North Dakota	1-13 North Dakota		1-106 N. W.
Oklahoma	1-15 Oklahoma		1-85 Pac.
Oregon	1-46 Oregon		1-85 Pac.
South Dakota	1-18 South Dakota		1-85 N. W.
Texas	1-37 Tex. Civ. App., 1-98 Tex.		1-93 S. W.
Utah	1-29 Utah		1-85 Pac.
Washington	1-40 Washington		1-85 Pac.
Wyoming	1-13 Wyoming		1-85 Pac.
Sup. Ct. U. S.	1-202 U. S.		1-26 Sup. Ct.
Federal			1-143 Fed.

Part X contains the several statutes and forms, a chapter being devoted to the United States and to each of the several states.

The running headlines at the top of each page will enable the reader, without turning back, to keep in constant touch with the changing matter of the different parts, chapters and sections.

Acknowledgment is here specially due to Hon. Thos. W. Jaycox, State Engineer of Colorado, not only for his encouragement of the task of the preparation of this work, but also for his more direct interest and the able assistance given in relation to the "Measurement of Water," chap. 14. He and his assistant, Mr. Beach, furnished most of the matter for this chapter. On the legal side in the preparation of this book H. C. Allen, Esq., of the Denver Bar, rendered valuable service.

J. WARNER MILLS.

Denver, Colo., February 5th, 1907.

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ADDENDA.

Two very important decisions have been recently handed down by the Supreme Court of Colorado, one of which relates to the method of attacking the rates fixed by the Board of County Commissioners for the carriage of water and the other, the organization of an incorporated irrigation district and the proceeding for the confirmation of its organization and a proposed issue of bonds.

In the first case it is held that where the rate fixed by the Board of County Commissioners (see *post* §93, *et seq.*), does not furnish sufficient revenue to pay the operating expenses of the irrigation company and a reasonable compensation for its services, which is confiscatory and a taking of property without compensation; that the County Commissioners will be enjoined from enforcing such a rate. If two years have elapsed since the rate was fixed by the Board, the complaint should show that an application has been made to the Commissioners to change or modify the rate or that the Commissioners have so expressed themselves as to indicate that such an application would be futile.

Board of County Commissioners of Montezuma County v. The Montezuma Water and Land Company (1907) (About) 38 Colo., 89 Pac.

In the second case it is held:

First.—That where there is a defect in the form or manner of publishing the notice of the time and place of the presentation of the petition to the Board of County Commissioners for the organization of an irrigation district, the notice is void and all subsequent acts by the commissioners or the Board of Directors of the District, are void for want of jurisdiction; that both the notice of the time and place of the presentation of the petition as well as the petition itself must be published and the *notice* must be signed by the petitioners, in addition to the signatures appearing to the petition published therein.

Second.—That the notice is directed to the land owners within the boundaries of the proposed district and not to the County Commissioners.

Third.—That in the confirmation proceeding, provided by the statute, if any of the proceedings are attacked, the burden of proof is upon the petitioners to show the regularity of each step taken in the organization of the district and the issuance of its bonds, and these facts must be established according to the common law rules of evidence.

Fourth.—That the action of the Board of County Commissioners in including and excluding lands, is subject to review by the courts, even though the board was not guilty of fraud or bad faith; that if the board, in the including or excluding of lands does not follow every step required by the statute, and as in the case at bar, submits these questions to a committee of the petitioners and acts upon the recommendation of this committee without hearing any evidence itself, the exclusion or inclusion is irregular and void.

Thomas F. Ahern *et al.* v. The Board of Directors of the High Line Irrigation District (1907) (About), 38 Colo., 89 Pac.

PART I.

HISTORICAL AND PRELIMINARY.

CHAPTER 1.

DEFINITIONS.

§ 1. Irrigation Defined.

The term "irrigation," as used in the arid or semi-arid states, means the application of water to land by artificial means, for the producing of agricultural crops and other products of the soil. (1) The Western courts have also quoted Webster's definition:

"The act of watering or moistening; especially the operation of causing water to flow over lands for nourishing plants." (2)

For the sake of convenience, definitions that will be given specific attention in the text of this work are mentioned in the note. (3)

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(1) Platte Water Co. v. Northern Colo. Irr. Co., 12 Colo. 525 ('89), 21 P. 711.

(2) *Id.*; Webster's Dict.

(3) "Abandonment," see §61.
"Adjudication," see §135.
"Appropriation," see §38.
"Appurtenance," see §120.
"Better right," see §§38, 46.
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"Canal companies," see §107.
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"Date of priority," see §55.
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"Injunction," see §138.
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"Irrigation," see §1.
"Irrigation companies," see §115

§ 2. Irrigation in Popular Use.

Under the term "irrigation," writers now discuss and treat the appropriation of water by artificial means, for agricultural, mining, manufacturing, power and other purposes, until at the present time the terms "irrigation," "irrigation law" or "irrigation code" are used to designate the use of water by artificial means and the laws relating to the same, for all beneficial purposes. (4)

CHAPTER 2.

HISTORICAL DEVELOPMENT.

§ 3. Historical Sketch: Eastern Hemisphere.

Irrigation is an ancient art, and was practiced by some of the ancient nations on a very extensive scale, probably even more so than in this day of progress and great undertakings. A difference of opinion exists among students as to where irrigation systems were first in use. The history of Egypt has been traced farther back, perhaps, than that of any other country, and that country has generally been regarded as the birthplace of irrigation. Its dams and canals which appear to be the oldest, are on a far greater scale, and show engineering feats far sur-

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"Irrigation in popular use," see §2.
"Mandamus," see §142.
"Mutual companies," see §117.
"Navigable rivers," see §28.
"Percolating waters," see §31.
"Priority," see §52.
"Reasonable time," see §49.
"Renting water," see §109.
"Riparian lands," see §19.
"Riparian rights," see §16.
"Selling water," see §109.
"Subterranean waters," see §33.
"Taxation," see §§166-167.
"Tenants in common," see §121.
"Waste water," §§36, 119.
"Watercourse," see §26.
"Wyoming system," §143.

(4) Colo. Const., Art. 16, §6.
Lamborn v. Bell, 18 Colo. 346 ('93), 32 P. 989. See constitutions and statutes of arid and semi-arid states and territories, *post*, Part X.

passing the later systems, and beyond comparison with similar undertakings of modern times. It is now generally believed that the six cataracts from Assouan to Khartoum, in the Nile river, were the work of man for the purposes of irrigation and navigation. They are engineering feats almost beyond modern comprehension. The remains of large canals are still found stretching through the country on both sides of the river, and the history of cities once flourishing where barren wastes now occur, attest the fact that, at one time, irrigation in these regions was successfully practiced. It is entirely possible that the Assyrians, Babylonians, Carthaginians and Phœnicians, also the subjects of Rome, learned of the wonderful benefits derived from artificial irrigation, from the Egyptians, for we have records showing that at a later date these several peoples practiced irrigation extensively. From Herodotus we find that the use of irrigation was exceedingly ancient. Writing about 450 B. C., he said:

"The land of Assyria is but little watered by rain, and that little nourishes the root of the corn. However, the stalk grows up, and the grain comes to maturity by being irrigated from the river, not, as in Egypt, by the river overflowing the fields, but it is irrigated by the hand and by engines. For the Babylonian territory, like Egypt, is intersected by canals, and the largest of these is navigable, stretching in the direction of the winter sunrise; and it extends from the Euphrates to another river, the river Tigris, on which the city of Ninevah stood. This is, of all lands with which we are acquainted, by far the best for the growth of corn." (5)

Herodotus also tells of a valley belonging to the Persians, where, by reason of the closing of five defiles in the mountains through which streams flowed that were used in irrigation, the land of the valley dried up, and became unproductive; that after the people had beseeched the king and paid tribute, the gates in the defiles were opened at certain times for the irrigation of crops.

(5) See "Roman Water Law," Ware, §11.

Dr. H. Otto Sommer and W. E. Ambrose have recently translated the code of laws of Hamurabbi, written about 700 years before the time of Moses, and there we find the various details of irrigation law carefully treated. The provision relating to dams is as follows:

"Any one failing to keep his irrigating dam in repair, and through his neglect and laziness a break occurs in the dam and his neighbors' lands are flooded by the overflow of the water therefrom, he shall compensate the owner of the damaged land for his loss of grain or other property occasioned by the overflow."

This is followed by provisions relating to the manner of collecting the damages by a sale of property and the disposition of the proceeds, and others relating to negligence in irrigating. (6)

Italy, from the earliest days of her history, had land under irrigation. In Book I of the Georgics, Virgil speaks of sowing the seed, and then of fetching the "gurgling streams" to allay the thirsty lands.

§ 4. Historical Sketch: Eastern Hemisphere — Continued.

Eugene F. Ware, in his work entitled "Roman Water Law," gives a translation of all of the laws relating to fresh water found in the "Corpus Juris Civilis." A perusal of this volume will show the reader how thoroughly the "Pandects" relating to irrigation covered the subject. For example:

"It is not acreage, but the use to which the water is put, that measures the right to the water." (7)

This author demonstrates that the various uses to which water could be applied were classified then as now, and in practice domestic use came first. It exceeds the limits of this volume to do more than call the reader's attention to the existence of these Roman laws as illustrating the fact that while our courts of the West in the early days were struggling with the conflict between the common law and the so-called "new system" of appropriation, centuries prior thereto

(6) See "Roman Water Law," Ware, §14.
(7) "Roman Water Law," Ware, §226.

dry and arid countries had evolved systems of irrigation and laws relating thereto that show thought and research upon the subject perhaps equal to our own.

The early history of Persia and of China shows that their peoples practiced irrigation at an early date. India has continued its use from the earliest times down to the present day, and possesses canals and aqueducts that are among the wonders of the world for engineering skill. Irrigation was early practiced in France, Spain, Sicily and Algeria, but in none of the older countries mentioned in this and the preceding section, where at remote periods irrigation was practiced extensively, is it used at all on so large a scale to-day.

§ 5. Historical Sketch: Western Hemisphere.

In South America there are to be found the ruins of canals and aqueducts constructed on an enormous scale, and showing a very high degree of civilization among the peoples by whom they were built. Prescott (8) speaks of these systems, and the fertility of the country along their routes. These works of the Incas have been allowed to go to decay, and to-day the irrigating systems used by their successors are crude and very ineffective. The Aztecs and Toltecs, who inhabited Central America, Mexico and what is now Arizona, had elaborate canal and irrigating systems, and in the valleys of the Salt and Gila rivers in Arizona are still to be found the ruins of many of their prehistoric canals. Some of these ancient water-ways in Arizona have been reclaimed in whole or in part, and are to-day conveying water to large and prosperous communities.

Mr. Justice Barnes, in the case of Clough v. Wing, 2 Ariz. 371 ('88), 17 P. 455, gives a very comprehensive résumé of the history of irrigation on this western continent, tracing its development, so far as authentic history enables, through the various races of aborigines and Indian tribes. He shows its development in Mexico, and the influence of the Span-

(8) 1 Prescott's "Conquest of Peru," pp. 112, 268.

ish and Mexican customs and laws upon the development of the customs and laws of Arizona. Irrigation has been practiced in California since the establishment of the Jesuit missions over a century ago. After the establishment of the San Diego Mission, a canal was constructed to convey water to the orchards, vineyards and other growing crops that had been planted. The ruins of many of these old canals or acequias, and reservoirs, built by the Indians under the guidance of the Spanish padre, are to be found in Southern California, attesting the early date at which water was applied to the soil to aid in the production of crops. (9)

Irrigation in Canada is of a more recent date, and is briefly treated in another part of this work. (10)

§ 6. Deductions from Historical Sketch—Riparian Rights.

From the history of this subject, dating as we have seen from the earliest period of Egyptian history (11) down to the period when extensive appropriations were made for mining and agriculture in the arid and semi-arid West, (12) we are unable to find any controversy between those claiming as riparian proprietors (13) and those engaged in diverting and conducting the water to non-riparian lands. (14) It seems to have been an accepted fact that the water was the property of the public, and when the necessities of the people required that it should be conducted from the stream and applied to the soil for the production of crops, the right to do so was unquestioned. It was provided as long ago as A. D. 286, that "if it can be fully proven that a flow of water through certain places is according to ancient custom, and that according to observation it shows usefulness in irrigating certain tracts of land, our pro-

(9) See Kinney "On Irrigation," §§10-17. Also, Bancroft's works.
(10) *Post*, §146.
(11) *Ante*, §3.
(12) *Post*, §§7-13.
(13) *Post*, §§16-24.
(14) *Id.*

curator will provide that no innovation against the old form and established custom be permitted." (15) Again:

"The right of conducting water and the right of drawing water at the same place can be granted to many different people, and can be granted also for different days or for different hours." (16)

"If the supply of water is sufficient, the right may be granted to many in the same place as well as for the same day or the same hour." (17)

"From my water right," so Labeo says, "I may accommodate my neighbors with water. On the other hand, Proculus holds that the water may not be used for any part of the estate other than that for which the right was acquired. The opinion of Proculus is the truer one." (18)

The difficulties that have arisen in those states and territories where two systems are attempted, (19) arises from the fact that the courts have endeavored to adhere to a principle—the common-law principle of riparian rights (20)—that grew up in England, a country where artificial irrigation was never necessary, and hence the necessities of the people there, and the conditions of the climate and soil, gave birth to a legal doctrine entirely suited to such conditions and the people they environed; whereas, in all those countries where the artificial application of moisture to the soil was a necessary prerequisite to the production of crops, the necessities of the people and conditions of climate and soil gave birth to the different doctrine of appropriation, (21) which grew into established law.

§ 7. Origin in the Arid States—"First Come, First Served."

The appropriation of water and its diversion

(15) "Roman Water Law," Ware, §252.
(16) "Roman Water Law," Ware, § 254. This is "Rotation," see *post*, §84.
(17) "Roman Water Law," Ware, §255.
(18) "Roman Water Law," Ware, §257.
(19) *Post*, §21.
(20) *Post*, §16.
(21) *Post*, §22.

from its natural channel, as opposed to the common-law doctrine of riparian rights, grew out of the use of water for mining, first in California and then in all the other arid and semi-arid states of the West. Water was a necessary incident to placer mining, and in certain respects to all other mining as well. Placer mining was the principal industry of California in the early fifties. (22) There were then no customs, no laws and no courts to guide the early settlers. They were forced to depend upon their own resources, and by their acts they established the customs that later became, first, the rule of decision in the courts, and ultimately, the law as enacted by the legislature. The nature of the use required that the water should be taken long distances from the stream and generally across gulches and ravines, and frequently over mountains and into foreign watersheds, thus rendering it impossible to return it to its original channel. Knowing little if anything about the common-law doctrine of riparian rights, they established as a fundamental doctrine the now-familiar principle of "first come, first served," and this principle has been recognized since by the courts and by the legislatures of all of the arid and semi-arid states as the foundation principle of the irrigation system. (23)

§ 8. Early California Decisions.

Immediately after their organization, the courts were confronted with the new and unheard-of custom, so far as countries adopting the common law were concerned, of diverting the water of a natural stream without returning it to its usual channel, and they were compelled to determine rights of appropriation and priority which under the laws of the United States, as well as under the common law as then understood and applied, could have no legal existence. We do not find the courts even at the outset any too friendly to the doctrine of riparian rights, but on the contrary sustaining the new doctrine of appropriation by prior

(22) Irwin v. Phillips, 5 Cal. 140, 63 Am. Dec. 113 ('55).
(23) Eddy v. Simpson, 3 Cal. 249, 58 Am. Dec. 408 ('53); Irwin v. Phillips, 5 Cal. 140, 63 Am. Dec. 113 ('55).

use. In the case of Eddy v. Simpson, (24) the plaintiffs brought suit to recover damages for interfering with their water right. They had prior occupancy of the waters of Shady Creek, by means of a dam and a ditch, and used the same for mining purposes. The defendants by like means obtained the use, for like purposes, of other neighboring streams, and after using the water it flowed by natural channels into Shady Creek above plaintiffs' dam. Defendants then built a dam above the plaintiffs', and withdrew a portion of the water from plaintiffs' works, so as to leave them a deficient supply, and at times to deprive them altogether of water. The defense was based upon the fact that defendants, having by their works added to the quantity of water in Shady Creek, had a right to withdraw a like quantity for their own use. It is important to note that the judge of the *nisi-prius* court, in charging the jury, gave the law substantially as it is to-day. He said:

"As a general principle, the party who first uses the water of a stream is, by virtue of priority of occupation, entitled to hold the same. If a company or association of miners construct a ditch to convey water from a running stream for mining *or other purposes*, and they are the first to use the water, locate and construct the ditch, they are legally entitled to the same as their property, to the extent of the capacity of the ditch to hold and convey water. For, if it appears that there is more water running in the stream than the ditch of the first party can hold and convey, then any other party may rightfully take and use the surplus, and it does not matter whether the excess of water be taken from a point above or below the dam of the first party. In the case before the court the plaintiffs are clearly entitled to as much water as they originally had in Shady Creek, but no more; and if the defendants, by constructing a ditch and dam at a point farther up the stream, convey water therefrom, so as to diminish the quantity first used by the plaintiffs, then they are liable to them in damages. If the defendants, by means of their ditch

(24) 3 Cal. 249, 58 Am. Dec. 408 ('53).

from Grizzly Canyon and Bloody Run, conveyed into Shady Creek as much water as they afterwards took from it, by their second ditch, then plaintiffs cannot be damaged. The doctrine of confusion or mixing of property does not apply. If defendants' ditch had conveyed the water into the ditch of the plaintiffs, then no doubt plaintiffs could have claimed the whole; but it emptied into Shady Creek a considerable distance above the plaintiffs' dam; and the point at which the second ditch takes off the water is still above the plaintiffs' dam, and in the natural channel of Shady Creek." (25)

Upon appeal, the supreme court held in this case that the use of water was usufructuary and consists not so much in the ownership of the fluid itself as in the advantage from its use; that after water had been used by the appropriator, he had no further interest in nor control over it, and any lower appropriator from a stream into which such water flowed would have the prior right thereto. Still, the supreme court was not apparently ready, in the face of the statute adopting the common law for the state of California, (26) to sustain the miners' customs, and said:

"The rule laid down by the court below (being that given above), while it is a departure from all the rules governing this description of property, would be impracticable in its application, and we think it much safer to adhere to known principles and well-settled law, so far as they can be made applicable to the novel questions growing out of the peculiar enterprises in which many of the people of this state are embarked."

The miners' customs, however, were in fact adopted by the court while verbally repudiating them, as the case was decided on the sole fact of prior possession by the plaintiffs, hence the reference to the common law was declaratory only and not controlling. (27)

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(25) Eddy v. Simpson, 3 Cal. 249 ('53), 58 Am. Dec. 408.
(26) Act 1850.
(27) Eddy v. Simpson, 3 Cal. 249 ('53), 58 Am. Dec. 408.

§ 9. Early California Decisions, Continued.

The leading case among the early decisions of California is that of Irwin v. Phillips. (28) The court there recognized the fact that the miners themselves had been tacitly permitted by the federal government, and heartily encouraged by the state, to divert and apply to beneficial uses the waters of the natural streams; that a sense of necessity and propriety had established the fact that the miners should be protected in their selected localities, and that protection should also be given to those who by prior appropriation had taken the waters from their natural beds, and by costly artificial works conducted them for miles over mountains and ravines to supply the necessities of gold diggers, and without which the most important interests of the mineral region would have remained without development. (29) The court in the Irwin-Phillips case also recognized that the legislature in various acts had referred to the use of water, but without conferring or confirming the rights, and that the right to divert the streams from their natural channels stood upon an equal footing with the privilege to work the mines, and that when they conflicted, they must be decided "by the fact of priority, upon the maxim of equity: *Qui prior est in tempore, potior est in jure.*" (30)

The court, however, did not attempt to reconcile the doctrine of riparian rights with the new custom of appropriation. It "expressly excluded riparian rights from a consideration of the case. The intention was to provide an entirely new system wherever mining customs prevailed." (31)

§ 10. Mining against Agriculture in California.

By the early settlers and the customs formulated by them, the right to appropriate water for mining purposes in California was understood to take precedence over an appropriation for any other pur-

(28) 5 Cal. 140, 63 Am. Dec. 113 ('55).
(29) *Id.*
(30) He who is first in time is first in right.
(31) Wiel "On Water Rights," §6; Crandall v. Woods, 8 Cal. 136 ('57); McDonald v. Bear River Co., 13 Cal. 220 ('59).

pose, and the legislature, by the act of 1852, called the "Possessory Act," and the act of 1855, called the "Indemnity Act," sought to establish this preference by law. The courts, however, were very strict in their application of the Possessory Act, holding that it only gave the miner the right to enter upon and mine, without injury to buildings or improvements, and that the act only conferred this right as against public lands held for agricultural or grazing purposes. (32)

§ 11. Mining against Agriculture in California, Continued.

An examination of the cases cited in § 10 will demonstrate the attitude of the California court, and show the growth of the law relating to the general beneficial use of water other than for mining, until appropriations of water for all purposes were held to be upon an equal footing, subject, of course, to the fundamental principle of priority. In the case of Rupley v. Welch, (33) the plaintiff owned a reservoir and ditch to supply water for the irrigation of a vineyard and agricultural crops. The defendants sought to interfere with his supply of water and to take it for mining purposes. The court said:

"The threatened diversion of water from plaintiff's reservoir is a clear violation of a vested right of property, acquired by the plaintiff by virtue of his prior appropriation of the water, and of which he cannot be divested for any private purposes or for the benefit of a few individuals."

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(32) Stoakes v. Barrett & Co. *et al.*, 5 Cal. 37 ('55); McClinton v. Bryden, 5 Cal. 97 ('55); Martin v. Bronner, 11 Cal. 13 ('58); Gibson v. Puchta, 33 Cal. 310 ('67). Compare 2 Mills' Ann. Stat. Colo., §§3606-23.

As to lands occupied by buildings, improvements, crops, etc.—Fitzgerald v. Urton, 5 Cal. 308 ('55); Burdge v. Underwood, 6 Cal. 13 ('55); Smith v. Doe, 15 Cal. 100 ('60); Gillan v. Hutchinson, 16; Cal. 154 ('60).

As to wood, timber and saw mills—Tartar v. Spring Creek Co., 5 Cal. 396 ('55); Rogers v. Soggs, 22 Cal. 444 ('63).

As to water—Irwin v. Phillips, 5 Cal. 140 ('55), 63 Am. Dec. 113; Tartar v. Spring Creek Co., 5 Cal. 396 ('55); Nevada Water Co. v. Powell, 34 Cal. 109 ('67); Campbell v. Bear River Co., 35 Cal. 679 ('68).

(33) 23 Cal. 453 ('63).

This case has been quoted with approval in numerous cases, among the most recent being the case of Natoma Water & Min. Co. v. Hancock, (34) where the court said:

"This is a doctrine which no one at the present day disputes."

CHAPTER 3.

FEDERAL, STATE, AND TERRITORIAL LAWS AND POLICY.

§ 12. Federal Statutes and Policy.

It had been the policy of the federal government to encourage the operations of the miners, and water being a necessary element in successful mining, particularly in the placer fields of California, the miners were permitted, without any objection from the owner of the fee (the United States), to divert the water from the streams and by artificial conduits to carry it to the point where it could be successfully and beneficially used. (35) The act of congress of July 26, 1866 (§168 *infra*), clearly recognizes a right to the use of water as independent of any interest in or title to land, and assures protection to this right whenever it has *"vested"* by *"priority of possession"*; provided the "local customs, laws, and decisions of courts" recognize such a right and such a mode of acquiring it. This act, together with the amendment of July, 1870, now form §§2339, 2340 Rev. Stat. U. S. (36) The supreme court of the United States, referring to this statute in 1879, said:

"It is the established doctrine of this court that rights of miners who had taken possession of mines and worked and developed them, and the rights of persons who had constructed canals and ditches to be used in mining operations and for purposes of agri-

(34) 101 Cal. 42 ('92), 31 P. 112, 35 P. 334 ('94).
(35) Irwin v. Phillips, 5 Cal. 140 ('55), 63 Am. Dec. 113; Atchison v. Peterson, 87 U. S. (20 Wall.) 507 ('74); Basey v. Gallagher, 87 U. S. (20 Wall.) 670 ('74).
(36) See Fed. Stat., *post*, §§168, 169.

cultural irrigation in the mining region where such artificial use of the water was an absolute necessity, are rights which the government had, by its conduct, recognized and encouraged, and was bound to protect, before the passage of the A. C. 1866. We are of the opinion that that act was rather a voluntary recognition of a pre-existing right of possession constituting a valid claim to its use than the establishment of a new one." (37)

This has been the basis of all of the federal decisions and has been accepted and approved by the appellate courts of all of the arid states and territories. (38)

§ 13. Early Federal Decisions—Atchison v. Peterson.

In the case of Atchison v. Peterson, (39) Mr. Justice Field, in delivering the opinion of the court, said:

"By the custom which has obtained among miners in the Pacific states and territories, where mining for the precious metals is had on the public lands of the United States, the first appropriator of mines, whether in placers, veins or lodes, or of waters in the streams on such lands for mining purposes, is held to have a better right than others to work the mines or use the waters. The first appropriator who subjects the property to use, or takes the necessary steps for that purpose, is regarded, except as against the government, as the source of title in all controversies relating to the property. As respects the use of water for mining purposes, the doctrines of the common law declaratory of the rights of riparian owners were, at an early day after the discovery of gold, found to be inapplicable, or applicable only in a very limited extent, to the necessities of miners, and inadequate to their protection. * * * So the miners on the public lands throughout the Pacific states and territories, by their customs, usages and regulations, everywhere recognized the inherent justice of this principle; and the principle itself was at

(37) Broder v. Water Co., 101 U. S. 275 ('79).
(38) *Post*, §15.
(39) Atchison v. Peterson, 87 U. S. (20 Wall.) 507 ('74).

an early period recognized by legislation and enforced by the courts in those states and territories. (Quoting with approval Irwin v. Phillips (40). * * *) The right to water by prior appropriation, thus recognized and established as the law of miners on the mineral lands of the public domain, is limited in every case, in quantity and quality, by the uses for which the appropriation is made. A different use of the water subsequently does not affect the right; that is subject to the same limitations, whatever the use. The appropriation does not confer such an absolute right to the body of the water diverted that the owner can allow it, after its diversion, to run to waste and prevent others from using it for mining or *other legitimate purposes;* nor does it confer such a right that he can insist upon the flow of the water without deterioration in quality where such deterioration does not defeat nor impair the uses to which the water is applied."

Thus the supreme court of the United States, at the very outset, sustained the customs and regulations of the miners relating to this new question, and, as we shall see, did not hesitate to declare the common-law doctrine of riparian rights, if applicable at all, applicable only to a limited extent. This question is discussed in §§16-20, under the title of "Riparian Rights."

§ 14. Federal Courts as to Mining and Agriculture —Basey v. Gallagher.

The United States supreme court in 1874 adopted the rule of the California and other western courts relating to the then frequent controversy between appropriators for mining and for agricultural purposes. In the case of Basey v. Gallagher (41) the court, referring to the case of Atchison v. Peterson, (42) said:

"The views there expressed and the rulings made are equally applicable to the use of water on the public lands for purposes of irrigation."

(40) *Supra*, §12.
(41) 87 U. S. (20 Wall.) 670 ('74).
(42) *Supra*, §13.

After quoting with approval from the opinion in the case of Tartar v. Spring Creek Water & Mining Co., (43) Mr. Justice Field said:

"Ever since that decision it has been held generally throughout the Pacific states and territories that the right to water by prior appropriation for any beneficial purpose is entitled to protection. Water is diverted to propel machinery in flour mills and saw mills, and to irrigate land for cultivation, as well as to enable miners to work their mining claims, and in all such cases the right of the first appropriator is respected and enforced."

In this case the court expressly avoided discussing the doctrine of riparian rights, saying:

"Neither party has any title from the United States; no question as to the rights of riparian proprietors can therefore arise. It will be time enough to consider those rights when either of the parties has obtained patent of the government."

The court did, however, formulate the policy that was followed in the later cases, to wit, that under the act of congress of July 26, 1866, (44) the federal court would follow the customs and regulations of the settlers, the decisions of the courts and the legislation of the state or territory where the cause of action might arise; and as this case originated in Montana Territory, the court considered the same in the light of the customs, decisions and laws of that territory.

CHAPTER 4.

RIPARIAN RIGHTS AS OPPOSED TO APPROPRIATION.

§ 15. State and Territorial Policies.

The doctrine of appropriation of water, so far as the United States is concerned, originated as we have seen (45) in California and the arid states in

(43) 5 Cal. 396 ('55).
(44) Rev. Stat. U. S., §2339; *post*, §168.
(45) *Supra*, §7.

general, out of the necessities of the miners. The fundamental principle of appropriation as established by miners' customs, (45) has been adopted in all of the seventeen arid or semi-arid states and territories: Arizona, California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington and Wyoming. Although the states and territories have differed in their legislative enactments as to the method of making a valid appropriation of water, and as to the administration of the irrigation laws, still, notwithstanding, they have all adhered to the doctrine of "prior appropriation" for beneficial purposes, (46) and by legislative enactments have from the very beginning declared that he who is "first in time is first in right." (47) The legislatures apparently had little or no difficulty in adopting as law the customs of the pioneers, but the courts in many of the states and territories struggled with the problem of appropriation as opposed to riparian rights. In those states that are only semi-arid, the courts were unable to break away from the common-law doctrine of riparian rights, and as a result of their decisions the two doctrines, as we shall see, (48) were left in such states to stand and jostle each other side by side; while in the arid states the doctrine of appropriation, to the exclusion of riparian rights, has been placed upon a firm foundation by judicial decisions and legislative enactments. (49)

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(46) Irwin v. Phillips, 5 Cal. 140, 63 Am. Dec. 113 ('55); Lobdell v. Simpson, 2 Nev. 274 ('66); Harris v. Shontz, 1 Mont. 212 ('70); Atchison v. Peterson, 87 U. S. (20 Wall.) 507 ('74); Coffin v. L. H. D. Co., 6 Colo. 530 ('83); Kaylor v. Campbell, 13 Ore. 596, 11 P. 301 ('86); Lehi Irr. Co. v. Moyle, 4 Utah 327, 9 P. 867 ('86); Malad Val. Irr. Co. v. Campbell, 2 Ida. 378, 18 P. 52 ('88); Clough v. Wing, 2 Ariz. 371, 17 P. 453 ('88); Tenem D. Co. v. Thorp, 1 Wash. St. 566, 20 P. 588 ('89); Sturr v. Beck [Dak. Ter.], 10 Sup. Ct Rep. 350, 133 U. S. 541 ('90); Barrett v. Metcalf, 12 Tex. Civ. App. 247, 33 S. W. 758 ('96); Moyer v. Preston, 6 Wyo. 308, 44 P. 845 ('96); Crawford Co. v. Hathaway, 60 Neb. 754, 84 N. W. 271 ('00), same 67 Neb. 325, 93 N. W. 781 ('03); Millheiser v. Long, 10 N. M. 99, 61 P. 111 ('00); Clark v. Allaman,— Kan.—, 80 P. 571 ('05)

(47) See statutes of the states and territories, *post*, Part X.

(48) *Post*, §20.

(49) *Post*, §§21-24.

§ 16. Riparian Rights.

"Riparian rights," according to the strict meaning of the phrase, are such as follow or are connected with the ownership of the banks of streams or rivers. The bed, which is a definite and commonly a permanent channel, is the characteristic which distinguishes waters of streams or rivers from mere surface drainage, flowing without a defined course or with uncertain limits, also from water percolating through the strata of the earth, both of which forms of occurrence are not subject to riparian rights, but form a part of the realty and belong exclusively to the owner of the same. (50)

Every proprietor of land on the bank of a river has an equal right to the use of the water which flows in the stream adjacent to his lands, as it was wont to flow, without diminution, pollution or alteration, unless his right has been limited by grant, license or prescription. (51) No proprietor along the bank of a stream, however, has a right to use the water to the prejudice of other proprietors above or below him, unless his right has been enlarged by grant, license or prescription. (52) He has no property in the water itself, but a simple usufruct while it passes along. *Aqua currit et debit currere solebat* (53) is the legal maxim. Though he may use the water while it runs over his land, he cannot unreasonably detain it, nor give it another direction, and he must return it to its ordinary channel when it leaves his

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(50) Taylor v. Fickas, 64 Ind. 167 ('78); Metcalf v. Nelson, 8 So. Dak. 87, 65 N. W. 911 ('95); Angell "On Watercourses," §10; Gould "On Waters," §148.

(51) Bealey v. Shaw, 6 East. 208 (1805); Mason v. Hill, 3 B. & Ad. 304 ('32); Davis v. Getchell, 50 Maine 602 ('62), 79 Am. Dec. 636; Johns v. Stevens, 3 Vt. 308; Anthony v. Lapham, 5 Pick. 175 ('27); Cowles v. Kidder, 24 N. H. 365; see, also, Gould "On Waters," §204.

(52) Owen v. Field, 102 Mass. 90 ('69); Baltimore v. Appold, 42 Md. 442; Pixley v. Clark, 35 N. Y. 520 ('66); Pollitt v. Long, 56 N. Y. 200 ('74), 58 Barb. 20; Arnold v. Foot, 12 Wend. 330 ('34); Lancey v. Clifford, 54 Me. 487; Bliss v. Kennedy, 43 Ill. 67 ('67); Oregon Const. Co. v. Allen D. Co., 41 Ore. 209, 69 P. 455 ('02).

(53) Water runs and ought to run as it was wont to run. Benton v. Johncox, 17 Wash. 277, 49 P. 495 ('97).

estate. (54) These rights are inseparably annexed to the soil, and pass with it not as an easement or appurtenance, but as a part and parcel of the land. This property right can be regarded only as a corporeal hereditament, belonging to and incident to the soil the same as though it were stones or grass. (55) The right does not depend on appropriation, (56) and is not suspended or lost by nonuser, (57) but may be lost by grant or prescription, or long adverse use; or in the semi-arid states, as we shall see, by condemnation. (58)

§ 17. Use of Water by Riparian Proprietor.

Under the common law the riparian proprietor is entitled to make a reasonable use of the water as it flows past or through his lands. The uses to which he can apply it are termed "ordinary" (58*a*) and "extra-

(54) 3 Kent Comm., p. *39; Gould, "On Waters," §204; cases cited in note 52 *supra;* Haas v. Choussard, 17 Tex. 588 ('56); Rhodes v. Whitehead, 27 Tex. 304, 84 Am. Dec. 631 ('63); Hayden v. Long, 8 Ore. 244 ('80); Shook v. Colahan, 12 Ore. 239, 6 P. 503 ('85); Lux v. Haggin, 69 Cal. 255, 10 P. 674 ('86); Crook v. Hewitt, 4 Wash. 749, 31 P. 28 ('92); Rigney v. Tacoma L. & W. Co., 9 Wash. 576, 38 P. 147 ('94); Montague v. Bd. of Co. Com., 7 Kan. App. 160, 53 P. 145 ('98); Cal. P. & A. Co. v. Enterprise L. & C. Co., 127 Fed. 741 ('03); Plattsmouth Water Co. v. Smith, 57 Neb. 579, 78 N. W. 275 ('99); Meng v. Coffey, 67 Neb. 500, 93 N. W. 713 ('03); Crawford Co. v. Hathaway, 67 Neb. 325, 93 N. W. 781 ('03); Stenger v. Thorp, 17 S. Dak. 13, 94 N. W. 402 ('03); Clark v. Allaman, — Kan. —, 80 P. 571 ('05).

(55) Crawford Co. v. Hathaway, 67 Neb. 325, 93 N. W. 781 ('03); Crittenden v. Alger, 11 Met. 281 ('46); Wadsworth v. Tillotson, 15 Conn. 365 ('43); Parker v. Griswold, 17 Conn. 287 ('45); Wheatley v. Baugh, 25 Pa. St. 528; Evans v. Merriweather, 3 Scam. 492 ('42); Union Mill Co. v. Ferris, 2 Sawy. 176 ('72); Heath v. Williams, 25 Me. 209, 43 Am. Dec. 265 ('45); Lux v. Haggin, 69 Cal. 255, 10 P. 674 ('86); Weiss v. Oregon I. & S. Co., 13 Ore. 496, 11 P. 255 ('86); Rigney v. Tacoma L. & W. Co., 9 Wash. 576, 38 P. 147 ('94); Clark v. Cambridge & A. Irr. & Imp. Co., 45 Neb. 798, 64 N. W. 239 ('95); Benton v. Johncox, 17 Wash. 277, 49 P. 495 ('97); Smith v. Denniff, 24 Mont. 20, 60 P. 398 ('99); Ore. Const. Co. v. Allen D. Co., 41 Ore. 209, 69 P. 455 ('02); Stenger v. Thorp, 17 S. Dak. 13, 94 N. W. 402 ('03).

(56) Cases cited in note 55 *supra.*

(57) Johnson v. Jordan, 2 Met. 234 ('41); Whitney v. Wheeler Cotton Mills, 151 Mass. 396, 24 N. E. 774 ('90); Orr v. O'Brien, 77 Ia. 253, 14 Am. St. 277 ('89), 42 N. W. 183; Pillsbury v. Moore, 44 Me. 154.

(58) Cases cited in note 55; *post,* §20.

(58*a*) Gould "On Waters," §205.

ordinary." (59) The term "ordinary use" covers the supplying of his natural wants such as drinking, washing, cooking, domestic purposes, and for the ordinary number of cattle. These ordinary uses carry with them the right to diminish the flow of the stream to the extent of such natural wants. (60) It was once held in some of the Eastern states and in England that irrigating the land of the riparian proprietor was a natural want. (61) But the humidity in these states is usually sufficient for all agricultural purposes, and it seems entirely probable that the term "irrigating" in the decisions referred to in the note, both English and American, did not mean such an extended diversion and use of the water from the main stream as is necessary in the arid and semi-arid countries. In the semi-arid states the enlargement of the use by riparian owners into what is there known as "irrigation" is usually classed as an "extra-ordinary" use, and can only be reasonably exercised, that is, exercised with due regard to the rights of other riparian proprietors to use the water for the same purpose. (62)

The right to the "extra-ordinary" use of water by the riparian proprietor, such as for irrigation, power and manufacturing purposes, is inferior to the right to the "ordinary" use of water, and can only be exercised when there is a surplus of water after supplying the natural wants of all riparian proprietors. The right to this "extra-ordinary" use, for the purposes mentioned above, is common to all riparian proprietors. Each must exercise the right subject

(59) *Id.*, §206.

(60) Union Mill Co. v. Ferris, 2 Sawy. 176 ('72); Gould "On Waters," §205; Miner v. Gilmour, 12 Moore P. C. 131; Atty. Genl. v. Great Eastern Ry. Co., 23 Law Times N. S. 344; Stein v. Burden, 29 Ala. 127; Anderson v. Cincinnati So. Ry., 86 Ky. 44 ('87), 5 S. W. 49.

(61) Weston v. Alden, 8 Mass. 136 (1811); Perkins v. Dow, 1 Root 535; Hayward v. Mason, 1 Root 537; Blanchard v. Baker, 8 Me. 266. Such, also, was the holding of the early decisions in England, but later they were repudiated, Gould "On Waters," §217.

(62) Baker v. Brown, 55 Tex. 377 ('81); Gould v. Stafford, 77 Cal. 66 ('88), 18 P. 879; Hayden v. Long, 8 Ore. 244 ('80); *post*, §18.

to the similar right of all the other proprietors, these rights and privileges being in all respects equal. If, in supplying his "extra-ordinary" wants, a riparian proprietor makes a reasonable use of the water and does not thereby prevent others from making a similar use, no action will lie; but whenever he deprives other riparian proprietors, in whole or in part, of the common benefit, an action will lie even though no actual damage is done. (63)

§ 18. Enlarging of Use by Riparian Owners.

As we have seen, (64) in the arid and semi-arid states and territories, the character of the soil and climate is such, that without the extensive application of water, agricultural crops could not be raised, and vast tracts of those commonwealths embracing the whole of the arid countries would remain barren and unproductive wastes. In the semi-arid states and territories, where the courts seem to have endeavored to ride two horses at the same time, in establishing the doctrine of appropriation, while adhering to the common-law doctrine of riparian rights, they generally found that to adhere strictly to the common law in the premises would not be of any great or material benefit even to the riparian proprietors, for a small portion only of their riparian lands would be productive without artificial irrigation. They also learned, and are still learning, that many of the streams are too small or the riparian lands are lying too high to permit of any extended irrigation by the riparian proprietors as a common and equal right. Hence it is, that the courts in these jurisdictions began quite early in their judicial considerations to *enlarge* the right of the riparian

(63) Pollution of stream by sewage, Merrifield v. Worcester, 110 Mass. 216 ('72); Pollution by mining company dumping gravel, sand and boulders into stream, People v. Gold Run D. & M. Co., 66 Cal. 138, 4 P. 1152 ('84); Angell "On Watercourses," §96 *et seq.*; Gould "On Waters," §§206, 207. Detaining and obstructing flow for manufacturing purposes, by means of dam, Oregon Iron Co. v. Trullenger, 3 Ore. 1 ('67); Shook v. Colahan, 12 Ore. 239, 6 P. 503 ('85). Diversion for manufacturing purposes without returning to stream, Weiss v. Oregon I. & S. Co., 13 Ore. 496, 11 P. 255 ('86).

(64) *Ante*, §§8, 9.

proprietor to use the water for the irrigation of his riparian lands in a "reasonable" manner and, as above stated, subject to the like right of all other riparian proprietors. (65) It is not unusual to find some of these courts using the familiar language of the "Irrigation System," and speaking of "appropriations" by riparian proprietors, "priorities," and of the "extent" of their use. (66) It was said by the supreme court of Oregon in the case of Jones v. Com.:(67)

"The old rule that a riparian owner is entitled to have the stream flow past his premises undiminished in quantity and quality, has been modified to mean that each proprietor is entitled to a reasonable use of the water for domestic, agricultural and manufacturing purposes, and such use is not to be denied on account of the loss necessarily consequent upon its proper enjoyment. He can make all the use he can —derive every benefit he can—from the stream, provided he does not abstract so much as prevents other people from having equal enjoyment with himself. In some of the Western states and territories, where the year is divided into one wet and one dry season, and irrigation is necessary to successful cultivation of the soil, the doctrine of riparian ownership has by judicial decision been modified or rather enlarged so as to include the reasonable use of natural water for irrigating the riparian land, although such use may appreciably diminish the flow down to the lower riparian proprietor. What is a reasonable use depends upon all the facts in the case."

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(65) Coffman v. Robbins, 8 Ore. 278 ('80); Jones v. Commonwealth, 39 Ore. 30, 64 P. 855 ('01); Gould v. Stafford, 77 Cal. 66, 18 P. 879 ('88); Bathgate v. Irvine, 126 Cal. 135, 58 P. 442 ('99); Missouri Pac. Ry. Co. v. Keys, 55 Kan. 205, 40 P. 275 ('95); Clark v. Allaman, — Kan. —, 80 P. 571 ('05); Cruse v. McCauley, [Mont.], 96 Fed. 369 ('99); Meng v. Coffey, 67 Neb. 500, 93 N. W. 713 ('03); McCook Irr. & W. Co. v. Crews, — Neb. —, 102 N. W. 249 ('05).

(66) Shook v. Colahan, 12 Ore. 259, 6 P. 503 ('85); Barrett v. Metcalf, 12 Tex. Civ. App. 247, 33 S. W. 758 ('96); Campbell v. Grimes, 62 Kan. 503, 64 P. 62 ('01); Lone Tree D. Co. v. Cyclone D. Co., 15 S. D. 519, 91 N. W. 352 ('02); Stenger v. Thorp, 17 S. D. 13, 94 N. W. 402 ('03).

(67) 39 Ore. 30, 64 P. 855 ('01).

In 1891 the U. S. circuit court for the district of Oregon, speaking of the right of a riparian owner to use the water of the stream for irrigation, said:

"They (plaintiffs who based their claim on riparian ownership) are entitled to all the water that flows through Pine Creek, if necessary for agricultural and domestic purposes, at least in preference to any ditch, whether made before or after the land was selected by the state." (68)

The courts began by assuming to adhere to the common-law principles of riparian rights, and have ended, or are fast tending to end, by enlarging or "modifying" (69) the common-law principles to meet the conditions demanded by the necessities of climate, soil and people. (70) In a very recent case decided by the supreme court of Nevada, (71) Talbot, J., in speaking of a claim based on riparian ownership, said:

"Congress, in appropriating millions for storage and distribution, and our legislature, have recognized the advantages of conserving the water above for use in irrigation instead of having it flow by the lands of riparian owners to finally waste by sinking and evaporation in the desert. The California decisions cited for appellants may no longer be considered good law, even in the state in which they were rendered. In the recent case of Kansas v. Colorado, before the supreme court of the United States, (72) Congressman Needham testified that irrigation had doubled and trebled the value of property in Fresno and Kings counties, California; that they had to depart from the doctrine of riparian rights, and under that doctrine it would be difficult to make any future development; that there had been a departure from the principles laid down in Lux v. Haggin, 69 Cal. 255, 10 P. 674, (73) because at that time the value of water

(68) Ison v. Nelson Min. Co., 47 Fed. 199 ('91); see, also, Watkins L. Co. v. Clements, 98 Tex. 578, 86 S. W. 733 ('05); reversing same, — Tex. —, 82 S. W. 665 ('04).
(69) Jones v. Com., 39 Ore. 30, 6 P. 855 ('01).
(70) See §20, "California System."
(71) Twaddle v. Winters, — Nev. —, 85 P. 280 ('06).
(72) *Post*, §§102-106.
(73) *Post*, §20.

was not realized; that the decision has been practically reversed by the same court on subsequent occasions, and that the doctrine of prior appropriation and the application of water to a beneficial use is in effect in force now in that state."

§ 19. What are Riparian Lands—Lateral Limits.

As we have seen in the preceding sections the rights designated as riparian are derived from ownership of land abutting on the stream, or through which the stream flows. In the semi-arid states and territories where, as we have seen, riparian rights are enlarged to permit of a diversion of the water for irrigation purposes, it becomes necessary to determine what lands are riparian, because the use under a riparian right cannot be made upon lands that are not riparian. It may be safely said that the common law does not fix any specific limit, measured away from the stream, as bounding the riparian right. It seems to be the universal rule that the extent away from the stream to which the right will reach must be determined by the circumstances and conditions affecting each particular case.

In England in the case of Stockport Water Works Co. v. Potter, (74) it was held that lands abutting on the stream were riparian, but no decision was given as to how far from the stream they still continued to be riparian. In Texas it has been held that riparian land must be within the limits of the original survey thereof as granted by the government, and also within the watershed of the stream and actually touch its waters. (75) In Oregon the supreme court said:

"The fact that a part of the land of a riparian proprietor extends beyond the natural watershed does not destroy its riparian character, and where a riparian owner acquires, under different grants, lands adjacent to the riparian lands, the lands become riparian, and he may use the water on either class under his riparian

(74) 3 H. & C., 326.
(75) Clements v. Watkins Land Co. *et al.*, — Tex. —, 82 S. W. 665 ('04); reversed in 98 Tex. 578, 86 S. W. 733 ('05).

rights so long as he does not injure lower proprietors." (76)

This limitation, however, is obscure; for the lower proprietor, having a senior right, might claim he was injured *per se* by the new and extended use of the water on the newly acquired lands. Under the "appropriation" system this is usually the case, and an action lies for the damages. (77)

In California the lateral limit is fixed in various decisions as the watershed of the stream. (78) The court, in Bathgate v. Irvine, (78) said:

"We think the rule should be that under the claim alone of riparian right, the owner of the land cannot, to the injury of another riparian owner, take the water beyond the natural watershed of the stream for any purpose, and that riparian rights cannot extend beyond the watershed of the stream, and that lands so situated are not to be regarded as riparian." (79)

In the recent case of Clark v. Allaman, (80) the supreme court of Kansas speaks of the rule as follows:

"In 3 Farnum on Waters, 1903, it is said, 'All conceptions of riparian land lead to the conclusion that it is land which is tributary to and lying along a watercourse, and as soon as the "divide" is passed and the watershed of another stream is reached, the land cannot be regarded as riparian with reference to the former stream, and since the right to water depends upon the land being riparian, the destruction of the riparian character destroys the right to irrigate.' Within these limits the principle of equality of right announced above should control the use of water for irrigation purposes by those whose land is affected by the presence of the stream, irrespective of the incidental matter of governmental subdivision of the land." (81)

(76) Jones v. Com., 39 Ore. 30, 64 P. 855, 65 P. 1068 ('01).
(77) See §136.
(78) Chauvet v. Hill, 93 Cal. 407, 28 P. 1066 ('92); Bathgate v. Irvine, 126 Cal. 135, 58 P. 442 ('99).
(79) To the same effect see So. Cal. Inv. Co. v. Wilshire, 144 Cal. 68, 77 P. 767 ('04).
(80) — Kan. —, 80 P. 571 ('05).
(81) Question of fact in each case, Ventura Co. v. Meiners, 136

§ 20. The "California System"—Lux v. Haggin.

The system growing out of the decisions and statutes of the semi-arid states, with California in the lead, has been denominated the "California System."(82) The "California System" is followed in Kansas, Montana, Nebraska, N. Dakota, Oklahoma, Oregon, S. Dakota, Texas and Washington. The leading case, though by no means the first case establishing or maintaining the "California System," is Lux v. Haggin. (83) A brief statement of the facts in that case are as follows:

The plaintiffs had a tract of land which they alleged was riparian to a certain watercourse known as Buena Vista slough, fed by the waters of Kern river, and from which river the water was being diverted to their detriment under a claim of appropriation by Haggin and others, who were finally substituted by the Kern River Land & Canal Company as the sole defendant. The defendant company was successful in the court below, and the plaintiffs, claiming riparian rights, appealed. The case was reversed because the trial court refused to permit the plaintiffs to show by rebutting evidence that certain obstructions testified by the defendant's witnesses as preventing the water in the stream from reaching their lands and thereby making them riparian, did not prevent the water from flowing down and reaching their lands. The trial court found that neither of the parties was a riparian owner, but the supreme court, while saying that if plaintiffs were not riparian owners they would have no cause of action; applied the law to the issues as made by the pleadings, and left the facts to be determined upon a new trial. Upon the first appeal Sharpstein, J., disposed of the relative strength of the two contend-

Cal. 284, 68 P. 818 ('02). Ownership of legal title is not the test—Bathgate v. Irvine, 126 Cal. 135, 58 P. 422 ('99). Even if contiguous to land owned by same claimant—Boehmer v. Big Rock, Etc., Co., 117 Cal. 19, 48 P. 908 ('97); Gould v. Stafford, 77 Cal. 66, 18 P. 879 ('88). But see Alta Land & W. Co. v. Hancock, 85 Cal. 219, 24 P. 645 ('90).

(82) Long "On Irrigation," §6.

(83) 69 Cal. 255, 10 P. 674 ('86). The first appeal of this case is reported in 4 P. 919, but is not to be found in the official volumes.

ing doctrines, appropriation and riparian rights, in the following language:

"But it is insisted by respondent's counsel that both the United States and this state have adopted a policy in respect of water flowing over their lands, which is inconsistent with the doctrine of riparian rights as we construe it. As a result of that policy it is claimed that a grant of land by either of those governments must be read as if it contained a condition that any one should thereafter be at liberty to appropriate so much of the water of any natural stream running over such lands as the grantee had not previously appropriated to some useful purpose other than that which it subserved by flowing naturally over such land. That would constitute a reservation of an interest in the land granted, not for the benefit of the grantor, but for that of any other person who might choose to avail himself of it. If a grant does not contain any such express reservation or condition, we ought not to interpolate one unless it is clearly implied, because the general rule is that the owner of property cannot be divested of any interest in it by the simple prior appropriation of that interest in it by some one else. Both the state and the United States governments have granted to private persons and corporations large tracts of land which have remained unoccupied and in their virgin state for many years afterwards. It probably never occurred to any one that the owners, by neglecting to appropriate the grasses and trees naturally growing on such lands to some useful purpose, left them open and subject to a rightful appropriation by some one else. And yet we have the same authority for holding that a simple grant of land conveys a right to have the water flowing over it continue so to flow, as we have for holding that it conveys a right to the trees and grasses growing on it, or to the soil itself. The principle that he who first appropriates property to a useful purpose is best entitled to it, applies only to cases in which none of the parties has a grant, actual or presumptive. * * * After carefully examining all the cases

bearing on this question, we are unable to find one in which it is held or even suggested that outside of the mining districts the common-law doctrine of riparian rights does not apply with the same force and effect in this state as elsewhere."

Ross, J., dissented, and wrote an opinion, pointing out that the common law must, if applied at all, be applied according to the natural conditions in the country where the application is made. In the states adopting the "California System" the courts following the Lux-Haggin case have taken the position that as the common law has been adopted by legislative enactment, as the rule of decision, except where changed by statute, the rights of a riparian owner, when they have once attached, cannot be divested except by grant or condemnation for a public use; that the United States, being the owner of the fee of all public lands, is also the riparian proprietor, and so long as the government is the sole riparian proprietor it can grant the right to appropriate and divert the waters of the streams and apply them to beneficial uses; but, the moment its title to the land passes to an individual, the riparian rights of the individual immediately vest, and no subsequent appropriations or diversions can be made unless by grant or condemnation. In these states the courts have sustained the statutes relating to the appropriation and diversion of water for use upon non-riparian lands, and have protected all appropriations *made prior* to the vesting of riparian rights in any individual; also those appropriations made thereafter, where the right to divert the waters has been acquired by adverse use, condemnation or grant. Thus we have in these states the doctrines of appropriation and riparian rights jostling each other as it were, yet still existing side by side. (84) In determining contro-

(84) Crandall v. Woods, 8 Cal. 136 ('57); Lux v. Haggin, 69 Cal. 255, 10 P. 674 ('86); Van Bibber v. Hilton, 84 Cal. 585, 24 P. 308 ('90); Alta Land Co. v. Hancock, 85 Cal. 219, 24 P. 645 ('90); Modoc, Etc., v. Booth, 102 Cal. 151, 36 P. 431 ('94); McGuire v. Brown, 106 Cal. 660, 39 P. 1060 ('95); Hargrave v. Cook, 108 Cal. 72, 41 P. 18 ('95); San Luis Water Co. v. Estrada, 117 Cal. 168, 48 P. 1075 ('97); Baxter v. Gilbert, 125 Cal. 580, 58 P. 129 ('99);

versies between appropriators and riparian proprietors, in the states and territories adopting the "California System," the precise date when the

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Bathgate v. Irvine, 126 Cal. 135, 58 P. 442 ('99); Calif. P. & A. Co. v. Enterprise, 127 Fed. 741 ('03); Ore. Iron Co. v. Trullenger, 3 Ore. 1 ('67); Taylor v. Welch, 6 Ore. 198 ('76); Coffman v. Robbins, 8 Ore. 278 ('80); Hayden v. Long, 8 Ore. 244 ('80); Shively v. Hume *et al.*, 10 Ore. 76 ('81); Shook v. Colahan, 12 Ore. 239, 6 P. 503 ('85); Weiss v. Ore. Iron & S. Co., 13 Ore. 496, 11 P. 255 ('86); Ison v. Nelson [Ore.], 47 Fed. 199 ('91); Low v. Schaffer *et al.*, 24 Ore. 239, 33 P. 678 ('93); Boyce v. Cupper, 37 Ore. 256, 61 P. 642 ('00); Cox v. Bernard, 39 Ore. 53, 64 P. 860 ('01); Jones v. Com., 39 Ore. 30, 64 P. 855 ('01); Brown v. Baker, 39 Ore. 66, 65 P. 799 ('01); Salem F. M. Co. v. Lord, 42 Ore. 82, 69 P. 1033 ('02); Ore. Const. Co. v. Allen D. Co., 41 Ore. 61, 69 P. 455 ('02); Britt *et al.* v. Reed, 42 Ore. 76, 70 P. 1029 ('02); Harrington v. Demarris, — Ore. —, 77 P. 603 ('04); Crook v. Hewitt, 4 Wash. 729, 31 P. 28 ('92); Shotwell v. Dodge, 9 Wash. 337, 36 P. 254 ('94); Rigney v. Tacoma L. & W. Co., 9 Wash. 576, 38 P. 147 ('94); Benton v. Johncox, 17 Wash. 277, 49 P. 495 ('97); Sander v. Wilson, 34 Wash. 659, 76 P. 280 ('04); City of New Whatcom v. Fairhaven L. Co., 24 Wash. 493, 64 P. 735 ('01); Mo. Pac. Ry. Co. v. Keys, 55 Kan. 205, 40 P. 275 ('95); Parker v. City of Atchison, 58 Kan. 29, 48 P. 631 ('97); Montague v. Bd. Co. Com., 7 Kan. App. 160, 53 P. 145 ('98); Campbell v. Grimes, 62 Kan. 503, 64 P. 62 ('01); Clark v. Allaman, — Kan. —, 80 P. 571 ('05); Clark v. Cambridge & A. Irr. Co., 45 Neb. 798, 64 N. W. 239 ('95); Ice Co. v. Guthrie, 42 Neb. 238, 60 N. W. 717 ('94); Slattery v. Harley, 58 Neb. 575, 79 N. W. 151 ('99); Plattsmouth Water Co. v. Smith, 57 Neb. 780, 78 N. W. 275 ('99); Crawford Co. v. Hathaway, 60 Neb. 754, 84 N. W. 271 ('00); 67 Neb. 325, 93 N. W. 781 ('03); Meng v. Coffey, 67 Neb. 500, 93 N. W. 713 ('03); Dunn *et al.* v. Thomas, — Neb. —, 96 N. W. 142 ('03); McCook I. & W. P. Co. v. Crews, — Neb. —, 102 N. W. 249 ('05); Haas v. Choussard, 17 Tex. 588 ('56); Rhodes v. Whitehead, 27 Tex. 304, 84 Am. Dec. 631 ('63); Tolle v. Correth, 31 Tex. 362, 98 Am. Dec. 540 ('68); Fleming v. Davis, 36 Tex. 173 ('72-3); Baker v. Brown, 55 Tex. 377 ('81); Mud Cr. Irr. A. & M. Co. v. Vivian, 74 Tex. 170, 11 S. W. 1078 ('89); Barrett v. Metcalf, 12 Tex. Civ. App. 247, 33 S. W. 758 ('96); Cape v. Thompson 21 Tex. Civ. App. 681, 63 S. W. 368 ('99); Clements v. Watkins Land Co., — Tex. —, 82 S. W. 665 ('04); reversed by Watkins L. Co. v. Clements, 98 Tex. 578, 86 S. W. 733 ('05); Smith v. Denniff, 24 Mont. 20, 60 P. 398 ('00), overruling Smith v. Denniff, 23 Mont. 65, 57 P. 557 ('99); Cruse v. McCauley, 96 Fed. 369 ('99); Sturr v. Beck, 6 Dak. 71, 50 N. W. 486 ('88); Sturr v. Beck, 10 Sup. Ct. 350, 133 U. S. 541 ('90); Metcalf v. Nelson, 8 S. Dak. 87, 65 N. W. 911 ('95); Lone Tree D. Co. v. Cyclone D. Co., 15 S. Dak. 519, 91 N. W. 352 ('02); Stenger v. Thorp, 17 S. Dak. 13, 94 N. W. 402 ('03); Lone Tree D. Co. v. Rapid City E. & G. L. Co., 16 S. Dak. 451, 93 N. W. 650 ('03); Bigelow v. Draper, 6 N. Dak. 152, 69 N. W. 570 ('96). The case of Lone Tree D. Co. v. Cyclone D. Co., *supra*, is still pending on a motion for a rehearing, and the court is being urged to depart from and modify its former holding as to the application of the common-law doctrine of riparian rights.

rights of the riparian proprietor vested, has been frequently the important question. It is now the settled law that the rights of a riparian proprietor attach at the very inception of his title, and that from that date such rights will be protected against subsequent appropriation. (85) These rights may be divested by grant or prescription or adverse user, or by condemnation (86) by a non-riparian owner. In order to make these riparian rights subject to condemnation under the right of eminent domain, however, both the statutes and the decisions of the courts have declared the use of the waters of the streams for beneficial purposes to be a public use. (87)

§ 21. The "Colorado System"—Yunker v. Nichols.

The concurrent adoption of the doctrine of appropriation and the rejection of the common-law doctrine of riparian rights first occurred in Colorado, and the system that has grown out of the early decisions in this state has been called the "Colorado System." In 1872 the territorial supreme court of Colorado had before it the case of Yunker v. Nichols. (88) Yunker brought an action for trespass on the case for the diversion of water from an irrigating ditch leading from Bear creek to the plaintiff's farm. The ditch was constructed in 1871 by the plaintiff, the defendant and one Bell, under a verbal agreement that they would share equally in the water to be conveyed therein, to irrigate their several parcels of land. After the ditch was constructed across defendant Nichols' land, to the land of the plaintiff, the defendant diverted the water upon his own land so that none passed down to the plaintiff. As it did not appear there was any memorandum of the agree-

(85) Sturr v. Beck, 6 Dak. 71, 50 N. W. 486 ('88); S. C., 10 Sup. Ct. 350, 133 W. S. 541 ('90); Benton v. Johncox, 17 Wash. 277, 49 P. 495 ('97).

(86) See cases cited in note 84, *supra*.

(87) Statutes of the states and territories, *post*, Part X; Lux v. Haggin, 69 Cal. 255, 10 P. 674 ('86); Border v. Trespalacios R. & I. Co., — Tex. —, 82 S. W. 461 ('04); S. C., 98 Tex. 494, 86 S. W. 11 ('05); Bullerdick v. Hermsmeyer, — Mont. —, 81 P. 334 ('05).

(88) 1 Colo. 551 ('72).

ment in writing, the trial court, Judge Wells presiding, took the position, that the right to flow water over the land of another was such an interest in the land as to bring the contract within the statute of frauds; and it not being in writing, the plaintiff could not recover. The court so instructed the jury and they accordingly returned their verdict for the defendant. In the appellate court we find that the three justices there presiding—Hallett, Belford and Wells, all still living in Denver, Colorado—were unanimous in the opinion that the plaintiff should recover, but each had a distinct and in some respects a widely different reason for his opinion. Hallett, C. J., contended that the statute of 1861, p. 67, providing that persons owning claims on the bank, margin or in the neighborhood of any stream, should have a right of way over adjacent lands for purposes of irrigation, was a statutory grant of a right of way and withheld from the landowner the absolute dominion of his estate which would enable him to deny the right of others to enter upon it for the purposes of obtaining needed supplies of water, and that this grant so given by statute grew out of the necessities of the country—that is, the soil and climate led to the enactment of the statute, and the statute gave the grant. In support of this contention, he said:

"The principles of the law are undoubtedly of universal application, but some latitude of construction must be allowed to meet the various conditions of life in different countries. The principles of the decalogue may be applied to the conduct of men in every country and clime, but rules respecting the tenure of property must yield to the physical laws of nature, whenever such laws exert a controlling influence. In a dry and thirsty land it is necessary to divert the waters of streams from their natural channels, in order to obtain the fruits of the soil, and this necessity is so universal and imperious that it claims recognition of the law. (Referring apparently to the statute.) The value and usefulness of agricultural lands, in this territory, depend upon the supply of water for irrigation and this can only be obtained

by constructing artificial channels through which it may flow over adjacent lands. These artificial channels are often of great length and rarely within the lands of a single proprietor. * * * Lands situated at a distance from the stream cannot be irrigated without passing over intermediate lands, and thus all tilled lands, wherever situated, are subject to the same necessity. In other lands where the rain falls on the just and the unjust, this necessity is unknown, and is not recognized by law. * * * When the lands of this territory were derived from the general government they were subject to the law of nature, which holds them barren until awakened to fertility by nourishing streams of water, and the purchasers could have no benefit from the grant without the right to irrigate them."

Belford, J., in a lengthy opinion, took the position that the defendant was estopped from denying plaintiff's right of way; that the verbal agreement between Yunker and Nichols was a parol license amounting in terms to an easement, revocable as to future enjoyment, but that being partly executed, and upon the faith of the license, Yunker having expended money in the construction of the ditch, the license would be enforced upon the two grounds of estoppel and fraud, and the specific performance of a partly executed contract to prevent fraud. In addition to the foregoing grounds, Justice Belford further urged that the territorial legislature, being "keenly alive to the wants and necessities of our people," had enacted a law on the subject of irrigation designed to secure to all claimants, owners or holders of land within the territory situated on the bank, margin or in the neighborhood of any stream of water, the use of the water of such stream for the purpose of irrigation and to make such land available to the full extent of the soil for agricultural purposes. He further argued that the legislature had provided that, when the land so held or owned was removed from such stream, the owner or claimant should have a right of way through the farms or tracts of land, above or below him, upon the stream;

that although there might be no express provision in the federal constitution authorizing the passage of this act by the territorial legislature of Colorado, neyertheless, the agricultural interests being among the most important interests of the territory, and a system of irrigation being necessary to foster and nourish such interests, it seemed clear and unquestionable, that the legislature had a right to legislate upon the subject; and that the legislative provisions as to the manner of enforcing this right could be waived by the parties as they were waived in the case at bar. In conclusion he said:

"I am fully aware that courts should be slow to justify their decisions on the ground of necessity, but I am equally conscious of the fact that they will betray their trust if, in the administration of law or in the expounding of constitutional principles, they shut their eyes and refuse to recognize those conditions of society which call into force and operation principles whose existence and recognition cannot be disregarded without bringing ruin on all. As has been well said by another, the law is not a system marked by folly, based on bald sentences, without reason; it is a grand code, founded on the necessities of men, erected by mature judgment, gradually expanding in beneficence and wisdom as time progresses, and regulating with care the interests of society and civilization. And so believing, I think the instructions given were erroneous, and that the judgment should be reversed and the cause remanded."

Justice Wells reversed his own holding and instructions to the jury on the circuit, and aided materially in laying the foundation of the "Colorado System." He dissented from the views of both justices Hallett and Belford, and held that the right of appropriation springs out of the necessities of climate and soil, wholly disconnected from statute, and that it existed before the statute was enacted and would still survive though the statute were repealed. He says:

"I conceive that, with us, the right of every proprietor to have a way over the lands intervening

between his possessions and the neighboring stream for the passage of water for the irrigation of so much of his land as may be actually cultivated, is well sustained by force of the necessity arising from local peculiarities of climate. * * * But it appears to me that this right must rest altogether upon the necessity rather than upon the grant which the statute assumes to make. For in other countries, where the necessity does not exist, the right has not been recognized in the courts nor attempted to be confirmed by statute. * * * If we say that the statute confers the right, then the statute may take it away, which cannot be admitted." Accordingly the case was reversed and remanded.

This case is especially noteworthy: First, in that the three judges readily agreed that because of the arid soil and climate of Colorado a man should have the right to build and maintain a ditch through the lands of another to carry water for purposes of irrigation, yet they were unable to agree upon the same reason to support this conclusion; Second, in that the ground they assumed in common—the law of necessity resulting from the imperious demands of nature in a country of arid soil and climate—is the same ground that requires a different rule than that afforded by the common-law doctrine of riparian rights and requires that doctrine to be substituted by the rule of appropriation; Third, in that this common ground was so well and firmly taken by all three judges that it practically swept away the common-law doctrine of riparian rights as applicable to Colorado, long before a case actually arose between an appropriator of water for irrigation and a riparian claimant along the natural stream.

Such a case did not actually arise until some ten years later, (89) and it was then decided upon the principle of the Yunker-Nichols case, but without referring to or citing the case itself. If this was an oversight it certainly was unfortunate; still there was a distinct recognition of the principle that had

(89) Coffin v. Left-Hand Ditch Co., 6 Colo. 443 ('82).

received common and general acceptance ever since its original promulgation in 1872.

§ 22. The "Colorado System"—Coffin v. Left-Hand Ditch Co.

The conflict between the doctrines of riparian rights and appropriation was first directly presented to the Colorado supreme court in the case of Coffin v. Left-Hand Ditch Co. (90) This is the case mentioned in the preceding section as failing to expressly cite the Yunker-Nichols case, though the doctrine of the latter undoubtedly controlled or influenced the conclusion of the former.

Coffin and others were the owners of land lying on the margin of the St. Vrain river, and the lands were so situated that they could be irrigated from that stream. The Left-Hand Ditch Co. was the appropriator of water from the creek, and carried it by a ditch over a divide to the watercourse of another stream, where it was again diverted by lateral ditches and used to irrigate lands adjacent to the latter stream, called the "Left-Hand Creek."

In 1879 there was not a sufficient quantity of water in the St. Vrain to supply the company's ditch and also to irrigate the riparian lands of the Coffin people. Accordingly the latter parties tore out a part of the company's dam, and thereby seriously interfered with the company's diversion of the water, and an action was brought by the Left-Hand Ditch Co. against Coffin and others, as defendants, for damages arising from this trespass, and also for injunctive relief. The defendants justified their trespass and right to the water by virtue of ownership of the lands along the St. Vrain, and in some instances, also, by appropriation of water from this stream, but it did not clearly appear that the alleged appropriations were prior to the appropriation relied on by the plaintiff company. A trial was had before a jury, and a verdict and judgment resulted in favor of the company. Upon this state of facts the supreme court of Colorado says:

(90) 6 Colo. 443 ('82).

"It is contended by counsel for appellants that the common-law principles of riparian rights prevailed in Colorado until 1876 (the date of the adoption of the constitution), and that the doctrine of priority of right of water by priority of appropriation thereof was first recognized and adopted in the constitution. But we think the latter doctrine has existed from the date of the earliest appropriations of water within the boundaries of the state. The climate is dry and the soil, when moistened only by the usual rainfall, is arid and unproductive; except in a few favored sections artificial irrigation for agriculture is an absolute necessity. Water in the various streams thus acquires a value unknown in moister climates. Instead of being a mere incident to the soil, it rises, when appropriated, to the dignity of a distinct usufructuary estate, or right of property. It has always been the policy of the national as well as the territorial and state governments, to encourage the diversion and use of water in this country for agriculture; and vast expenditures of time and money have been made in reclaiming and fertilizing by irrigation portions of our unproductive territory. Houses have been built and permanent improvements made; the soil has been cultivated, and thousands of acres have been rendered immensely valuable, with the understanding that appropriations of water would be protected. Deny the doctrine of priority or superiority of right by priority of appropriation, and a great part of the value of all this property is destroyed. The right to water in this country, by priority of appropriation thereof, we think it is and has always been, the duty of the national and state governments to protect. The right itself, and the obligation to protect it, existed prior to legislation on the subject of irrigation. It is entitled to protection as well after patent to a third party of the land over which the natural stream flows, as when such land is a part of the public domain; and it is immaterial whether or not it be mentioned in the patent and expressly excluded from the grant. The act of congress, protecting in patents such right in water appropriated, when

recognized by local customs and laws, 'was rather a voluntary recognition of a pre-existing right of possession, constituting a valid claim to its continued use, than the establishment of a new one.' Broder v. Natoma W. & M. Co., 11 Otto. 274 ('79). We conclude, then, that the common-law doctrine giving the riparian owner a right to the flow of water in its natural channel upon and over his lands, even though he makes no beneficial use thereof, is inapplicable to Colorado. Imperative necessity, unknown to the countries which gave it birth, compels the recognition of another doctrine in conflict therewith. And we hold that, in the absence of express statutes to the contrary, the first appropriator of water from a natural stream for a beneficial purpose has, with the qualifications contained in the constitution, a prior right thereto to the extent of such appropriation."

It was expressly pointed out that the patent under which George W. Coffin held title was issued prior to the act of congress of 1866, (91) and accordingly, there was no reservation or exception in it of any ditches or water rights, but it conveyed to Coffin, through his grantor, the absolute title in fee simple to the land together with all easements and appurtenances; and the court relies upon the case of Broder v. Natoma W. & M. Co., (92) as being a decision by the supreme court of the United States sufficiently in point, notwithstanding the date or contents of the Coffin patent, to sustain the principle of appropriation as announced in the foregoing quotation. This case has been followed, on this point, in Colorado, in many cases until it has become accepted as the law of the state beyond dispute. (93)

§ 23. The "Colorado System" in the Federal Courts.

There have been very few cases in the federal courts from the states or territories where the doc-

(91) U. S. Rev. Stat., §2339; *post*, §168.
(92) 101 U. S. 274 ('79).
(93) Golden Canal Co. v. Bright, 8 Colo. 144, 6 P. 142 ('84); Hammond v. Rose, 11 Colo. 524, 19 P. 466 ('88); Oppenlander v. L. H. D. Co., 18 Colo. 142, 31 P. 854 ('92).

trine of appropriation has been accepted, (94) and the common-law doctrine of riparian rights discarded as inapplicable to the conditions of the country. Three cases originating in Colorado have been before the circuit court for the district of Colorado, but in none of them was there any decision directly on the question of appropriation as opposed to the common-law doctrine of riparian rights. In the case of Freehold L. & E. Co. v. Diego Gallegos (95) the court expressly refrains from indicating what its opinion will be when the conflict between these two doctrines is properly presented. The case of Mason v. Cotton (96) involved the rights of two riparian owners to the use of water to operate their respective mills, and the court, while refusing an injunction, held that each riparian owner has a right, within his own territory, to the use of the water as it flows, returning it to the channel of the river for the use of others below, and that if the water may be conveniently used by two riparian owners, without strictly enforcing such right, a court of equity may refuse to lend its aid. In the case of Schwab v. Beam (97), Hallett, D. J., who sat on the territorial supreme bench in the case of Yunker v. Nichols, (98) rendered an opinion that has been pronounced as extreme, (99) and has met with criticism, (100) but a careful reading of the opinion leads to the belief that the court did not intend to deny the right of appropriation, but held that the location of a placer mining claim on the banks of a stream, from the very nature of placer mining, demands water, and that therefore the location of the placer, *ipso facto*, appropriates the water for that purpose. Judge Hallett said:

(94) Arizona, Colorado, Idaho, Nevada, New Mexico, Utah and Wyoming.
(95) 1 Leg. Adv. 412, 89 Fed. 769 ('98).
(96) 4 Fed. 792 ('80).
(97) 86 Fed. 41 ('98). This case was appealed to the supreme court of the U. S., and, after the first oral argument, that court of its own motion requested the attorneys to present a second oral argument; but, before a second presentation was made, the case was compromised out of court, and no decision was rendered.—Ed.
(98) 1 Colo. 551 ('72); see *ante*, §21.
(99) Morrison's "Mining Rights" (12th ed.), 180.
(100) Wiel "On Water Rights," §87.

"The waters were appropriated when the claims were located, and the owner of the claims is entitled to have them *ut currere solebat*, without diminution, subject to the reasonable use of other riparian owners higher upon the course of the stream."

The word "riparian," as used in the opinion, does not indicate the sole source of the right asserted or referred to, but is qualified by the statement that "the waters were appropriated." He further says:

"An early advocate of the right to appropriate water for irrigating lands, as always understood and maintained in this state, the author of this opinion desires to recognize and enforce the principle on which it stands in every case to which it may be applicable."

While the wording of the opinion would lead the reader to infer that an attempt was there made to distinguish between riparian rights for mining, manufacturing or mechanical purposes, and appropriation and diversion for agricultural purposes, nevertheless it may well be argued that the court intended only to hold that where land situated on the banks of a stream is located, and water used for any of these purposes, there is, *ipso facto*, an appropriation of the waters of the stream for such purposes. Whether this proposition is tenable or not, it is far from discarding the doctrine of appropriation for the common-law doctrine of riparian rights.

Probably the strongest case sustaining the "Colorado System" was decided by the circuit court of appeals for the district of Nevada, (101) and in sustaining the doctrine of appropriation the court said:

"Riparian rights are founded upon the ancient doctrine of the common law. If the law is a progressive science, courts should keep pace with the progress and advancement of the age, and constantly bear in mind the wants and necessities of the people and the peculiar conditions and surroundings of the country in which they live. In this connection it has been said to be one of the excellencies of the

(101) Union Mill Co. v. Dangberg, 81 Fed. 73 ('97).

common law, that it admits of perpetual improvement, by accommodating itself to the circumstances of every age, and applies to all changes in the modes and habits of society, and in this respect it will never be outgrown by any refinements, and never out of fashion, while the ideality of human nature exists. * * * In Nevada the case of Van Sickle v. Haines, (102) has been overruled and the principles of prior appropriation accepted as applicable to the existing conditions of the soil and climate of this state. (103) This change is the natural outgrowth of the conditions existing in this state. The climate is dry, the soil is arid, when water is used thereon it becomes capable of successful cultivation. There are but few streams of water. The benefits accruing to land along the banks of these streams by the mere flow of water in the channel is very slight. The bottom lands that can be irrigated by a diversion of the water so that it can be turned back into the stream are of limited extent. A large portion of the area of land suitable for cultivation would have to remain in its wild and unproductive state unless the right to appropriate and divert water away from the channel for the purpose of irrigating such lands is recognized and secured." (104)

The U. S. circuit court of appeals for the ninth circuit, in a case appealed from the circuit court for the district of Idaho, (105) sustained the doctrine of appropriation, as opposed to the riparian rights of the United States, asserted for a military reservation. Justice Gilbert dissented from the majority opinion and contended that the rights of the federal government could not be divested by an appropriation and diversion so as to prevent it from thereafter asserting its riparian rights for lands withdrawn for its own special use. None of these federal cases reached the United States supreme court, but from the opinion of that court in Sturr v. Beck (106) and

(102) 7 Nev. 249 ('72).
(103) Citing Jones v. Adams, 19 Nev. 78, 6 P. 442 ('85).
(104) Union Mill Co. v. Dangberg, 81 Fed. 73 ('97).
(105) Krall v. U. S., 79 Fed. 241 ('97).
(106) 10 Sup. Ct. 350, 133 U. S. 541 ('90).

the views of the court as expressed in Atchison v. Peterson, (107) Basey v. Gallagher, (108) and Broder v. Water Co., (109) it would reasonably appear (not speaking now with reference to interstate waters) (109a) that the conflict between the doctrines of appropriation and riparian rights, would in every case be decided according to the rules, customs, laws and decisions of the state or territory where the controversy arises. In Sturr v. Beck (110), a case that arose in Dakota, the court expressly said:

"The local custom is set forth in the findings to have consisted in the 'recognition and acknowledgment of the right to locate water rights and to divert, appropriate and use the waters of flowing streams for purposes of irrigation, when such location, diversion and use do not conflict with rights vested and accrued prior thereto.' Thus, under the laws of congress and the territory, and under the applicable custom, priority of possession gave priority of right."

§ 24. The "Colorado System" Followed by Nevada.

In 1872, the same year the supreme court of Colorado decided the Yunker-Nichols case, (111) the supreme court of Nevada, in a very lengthy opinion, sustained the application of the common-law doctrine of riparian rights, following the line of argument still adhered to in those states where the dual system of appropriation and riparian rights exists. (112) This remained the rule of decision in that state for thirteen years, (113) and until the supreme court in the case of Jones v. Adams (114) expressly overruled the case of Van Sickle v. Haines (115) and held that the doctrine of appropriation for bene-

(107) 20 Wall. 507 ('74).
(108) 20 Wall. 682 ('74).
(109) 101 U. S. 247 ('79).
(109a) As to interstate waters, see §108.
(110) 10 Sup. Ct. 350, 133 U. S. 541 ('90).
(111) See §21.
(112) Van Sickle v. Haines, 7 Nev. 249 ('72). See, also, §20.
(113) Lake v. Tolles, 8 Nev. 285 ('73); Barnes v. Sanborn, 10 Nev. 217 ('75); Smith v. Logan, 18 Nev. 149, 1 P. 678 ('83).
(114) 19 Nev. 78, 6 P. 442 ('85).
(115) 7 Nev. 249 ('72).

ficial purposes by reason of the necessities of the country had been adopted as an early custom recognized by the United States in the act of 1866 (116) and applicable to the conditions existing in Nevada by reason of its arid climate and the necessities of its people. This decision has been followed in a number of cases until in 1902, in the case of Walsh v. Wallace, the court said:

"All parties concede that the rule (riparian rights) does not apply in Nevada." (117)

In a recent case (117*a*) the supreme court of Nevada, in speaking of the California decisions sustaining the dual system, said:

"The California decisions cited for appellants may no longer be considered good law even in the state in which they were rendered. In the recent case of Kansas v. Colorado, before the supreme court of the United States, Congressman Needham testified that irrigation had doubled and trebled the value of property in Fresno and King's counties, California; and that they had to depart from the doctrine of riparian rights and under that doctrine it would be difficult to make any future development; that there has been a departure from the principles laid down in Lux v. Haggin, 69 Cal. 255, 10 P. 674, because at that time the value of water was not realized."

§ 25. The "Colorado System" in Other Arid States.

In 1890 the supreme court of Idaho in the case of Drake v. Earhart, (118) in speaking of the doctrine of riparian rights, said:

"While there are questions growing out of the water laws and rights not fully adjudicated, this phantom of riparian rights, based upon facts like those in this case, has been so often decided adversely to such claim and in favor of the first appropriator, that the maxim 'first in time, first in right,' should

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(116) Federal Statutes, *post*, §168.

(117) Walsh v. Wallace, 26 Nev. 299, 67 P. 914 ('02). See, also, Reno Smelting M. & R. Co. v. Stevenson, 20 Nev. 269, 21 P. 317 ('89); Ronnow v. Delmue, 23 Nev. 29, 41 P. 1074 ('95).

(117*a*) Twaddle v. Winters, — Nev. —, 85 P. 280, 284-5 ('06).

(118) 2 Ida. 716, 23 P. 541 ('90).

be considered the settled law here. Whether or not it is a beneficent rule it is the law of necessity." (119)

Berry, J., dissented, denying that the doctrine of riparian rights is a phantom unless unlawfully and unjustly made so. The doctrine first promulgated by the Colorado court was followed by New Mexico in 1891, (120) by Utah in 1891, (121) and by Wyoming in 1896. (122) The Wyoming supreme court in Moyer v. Preston handed down a very carefully considered opinion, and after discussing the decisions of those states adhering to the common-law doctrine of riparian rights, followed the views expressed by the Colorado supreme court in Coffin v. Left-Hand Ditch Co. (123) Arizona declared itself in 1895, saying:

"Not even the common-law doctrine of riparian rights is acknowledged by us." (124)

In all of the arid states following the "Colorado System" and sustaining the doctrine of appropriation as against the common-law doctrine of riparian rights, the law has become well settled and litigants are not inclined to raise nor the courts to listen to any other contention. Its beneficent results have now been demonstrated by more than thirty years of continuous practice, and the property interests that have developed under it now amount in value to hundreds of millions of dollars.

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(119) See, also, Krall v. U. S. [Ida.], 79 Fed. 241 ('97).
(120) Trambley v. Luterman, 6 N. M. 15, 27 P. 312 ('91).
(121) Stowell v. Johnson, 7 Utah 215, 26 P. 290 ('91).
(122) Moyer v. Preston, 6 Wyo. 308, 44 P. 845 ('96); Willey v. Decker, 11 Wyo. 32, 73 P. 210 ('03).
(123) 6 Colo. 443 ('82).
(124) Austin v. Chandler, — Ariz. —, 42 P. 483 ('95).

PART II.

APPROPRIATION OF WATER AND ITS INCIDENTS.

CHAPTER 5.

SOURCES OF WATER FOR APPROPRIATION.

(*a*) *Natural Rivers, Streams, Tributaries, Rainfall, Canyons and Reservoirs.*

§ 26. Natural Rivers and Streams—Watercourse.

The sources of appropriation are many, and there are numerous decisions defining them. The most common source is the surface watercourse. The constitutions and statutes of the arid and semi-arid states and territories almost invariably refer directly to "running streams," "natural stream," "water in a watercourse," and "flowing water," (1) and these terms are almost universally used by the courts in defining the principal source of appropriation. To constitute a watercourse, the size of the stream is immaterial. It must be a stream in fact, as distinguished from mere surface drainage occasioned by freshets or other extraordinary causes, but the flow of water need not be constant. (2) There must be a stream usually flowing in a particular direction. When water has a definite source, as a spring, and takes a definite channel, it is a water-

(1) See laws of states and territories, *post*, Part X.

(2) A stream may sink in the sands and disappear, leaving a dry channel for a distance, when it will rise again to the surface. This does not destroy its character as a watercourse. See Barnes v. Sabron, 10 Nev. 217 ('75); Platte Val. Irr. Co. v. Buckers Irr. M. & Imp. Co., 25 Colo. 77, 53 P. 334 ('98); *post*, §33, subterranean waters in defined channels.

course. (3) There must be a channel, a bed to the stream, and not merely low land or a slough over which water flows. (4) In every arid or semi-arid state and territory it is to-day provided, in effect, by constitution or statute, that the water of the natural streams not heretofore appropriated is the property of "the public," or "the people," and subject to appropriation. (5) In Colorado, (6) Idaho (7) and Wyoming, (8) this provision is embodied in the constitution.

§ 27. Tributaries.

The watercourses constituting the drainage system of a watershed constitute a common source. An appropriation of the waters of a certain stream naturally applies to the waters of all tributaries of that stream above the point of appropriation and diversion, (9) and the rights of the appropriator cannot be impaired by subsequent appropriations of water from such tributaries. (10)

§ 28. Navigable Waters.

A navigable river has been defined by the supreme court of Nebraska as one which affords a channel

(3) Pyle v. Richards, 17 Neb. 180, 22 N. W. 370 ('85); Morrisey v. C. B. & Q. R. Co., 38 Neb. 406, 56 N. W. 946 ('93); see, also, Palmer v. Waddell, 22 Kan. 248 ('79); Rait v. Furrow, — Kan. —, 85 P. 934 ('06); Rigney v. Tacoma L. & W. Co., 9 Wash. 576, 38 P. 147 ('94).

(4) Chicago K. & W. R. Co. v. Morrow, 42 Kan. 339, 22 P. 413 ('89); see, also, Barnes v. Sabron, 10 Nev. 217 ('75); Union Pac. R. Co. v. Dyche, 31 Kan. 120, 1 P. 243 ('83); Lux v. Haggin, 69 Cal. 255, 10 P. 674 ('86); Geddis v. Parrish, 1 Wash. St. 587, 21 P. 314 ('89); Simmons v. Winters, 21 Ore. 35, 27 P. 7 ('91); Ft. Morgan L. & C. Co. v. So. Platte D. Co., 18 Colo. 1, 30 P. 1032 ('92); Town v. Missouri Pac. Ry. Co., 50 Neb. 768, 70 N. W. 402 ('97); Platte Val. Irr. Co. v. Buckers I. M. & Imp. Co., 25 Colo. 77, 53 P. 334 ('98).

(5) Statutes of states and territories, *post*, Part X.

(6) Art. 16, §§5, 6.

(7) Art. 15, §3.

(8) Art. 1, §31.

(9) Irr. Co. v. Campbell, 2 Ida. 378, 18 P. 52 ('88); Low v. Shaffer, 24 Ore. 239, 33 P. 678 ('93); Low v. Rizor, 25 Ore. 551, 37 P. 82 ('94).

(10) Strickler v. City of Colo. Sprs., 16 Colo. 61, 27 P. 313 ('91); Farmers' Ind. D. Co. v. Agri. D. Co., 22 Colo. 513, 45 P. 444 ('96); Platte Val. Irr. Co. v. Buckers Irr. M. & Imp. Co., 25 Colo. 77, 53 P. 334 ('98).

for useful commerce. (11) The beds of navigable streams belong to the state. (12) In the arid and semi-arid states and territories navigable rivers are comparatively few, and the courts in these localities have not been called upon to pass upon the validity of appropriations from such streams except in a few widely separated instances. There is no doubt but that the waters of these streams may be appropriated so long as the navigable character of the river is not impaired. (13)

§ 29. Interstate Streams.

The doctrine of appropriation as applied to interstate waters has been before the courts a number of times within the past ten years, and the state and United States circuit courts have recognized the appropriation of the waters of interstate streams, and have protected the prior appropriators against diversions by subsequent appropriators in the adjoining state. (14) In a very recent case involving interstate waters, the question of priority as between

(11) Clark v. Cambridge & A. I. & I. Co., 45 Neb. 798, 64 N. W. 239 ('95).

(12) Green v. Swift, 47 Cal. 536 ('74); Cardwell v. Sacramento Co., 79 Cal. 347, 21 P. 763 ('89); Gould "On Waters," §§42, 78; 1 Stat. at Large 468, §9; 2 *Id.* 235, §17; U. S. Rev. Stat., §2476.

(13) Miller v. Enterprise Co., 142 Cal. 178, 75 P. 770 ('04); Montecito Co. v. Santa Barbara, 144 Cal. 578, 77 P. 1113 ('04); U. S. v. Rio Grande D. & I. Co., 174 U. S. 690, 19 Sup. Ct. 770 ('99). In this case the court discusses the question of a trial court taking judicial notice of the navigability of a river. The supreme court of the United States held that "the question always is one of fact whether such appropriation substantially interferes with the navigable capacity within the limits where navigation is a recognized fact." The supreme court of the territory of New Mexico was reversed, and the case remanded, with instructions to set aside the decree of dismissal and to order an inquiry into the question whether the intended acts of the defendants in the construction of a dam and appropriating the waters of the Rio Grande river would substantially diminish the navigability of that stream. This case was again before the United States supreme court and is reported 184 U. S. 416, 22 Sup. Ct. 428 ('01); see, also, Barrett v. Metcalf, 12 Tex. Civ. App. 247, 33 S. W. 758 ('96).

(14) Howell v. Johnson [Mont.], 89 Fed. 556 ('98); Conant v. Deep Cr. & Curlew Val. Irr. Co., 23 Utah 627, 66 P. 188 ('01); Morris v. Bean [Mont.], 123 Fed. 618 ('03); Hoge v. Eaton, — Colo. —, 135 Fed. 411 ('05); Clark v. Allaman, — Kan. —, 80 P. 571 ('05).

the appropriators of the different states was not considered, but the court rotated the water between the appropriators in the two states, giving the entire flow to one set for five days and to the other set for the next five days. (15)

§ 30. Rainfall and Canyons.

A valid appropriation of water may be made from a canyon, gorge or ravine, notwithstanding it is not a running stream, and the water comes entirely from rainfall and melting snow in the surrounding hills. These waters, ordinarily classed as "surface waters," (16) by assuming a natural and defined channel, and escaping through that channel, become possessed of the attributes of the waters of a natural watercourse, and subject to appropriation and diversion. (17)

(b) *Percolating and Subterranean Waters, Seepage and Springs.*

§ 31. Percolating Waters.

Percolating waters are those which seep through the soil and gravel without any definite channel, and do not form part of the body or flow, surface or subterranean, of any stream. (18) These waters belong to the soil, form a part of the realty, and may be used and controlled by the owner of the realty without regard to the effect of such use upon his neighbor's land or supply of water. (19) Such use, however,

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(15) Anderson v. Bassman [C. C. Cal.], 140 Fed. 14 ('05); see *post*, Part IV, ch. 14, §87.

(16) Los Angeles Assn. v. Los Angeles, 103 Cal. 466, 37 P. 375 ('94).

(17) Palmer v. Waddell, 22 Kan. 248 ('79); Denver T. & Ft. W. R. Co. v. Dotson, 20 Colo. 304, 38 P. 322 ('94).

(18) Gould "On Waters," §280; Vineland, Etc., Co. v. Azusa Co., 126 Cal. 486, 58 P. 1057 ('99).

(19) Mosier v. Caldwell, 7 Nev. 363 ('72); Emporia v. Soden, 25 Kan. 410 ('81); Sullivan v. Northern Spy. M. Co., 11 Utah 438, 40 P. 709 ('95); Crescent Min. Co. v. Silver King M. Co., 17 Utah 444, 54 P. 244 ('98); Willow Cr. Irr. Co. v. Michaelson, 21 Utah 248, 60 P. 943 ('00); Herriman Irr. Co. v. Keel, 25 Utah 96, 69 P. 719 ('02); Bruenning v. Dorr, 23 Colo. 195, 47 P. 290 ('96); Wilson v. Ward, 26 Colo. 39, 56 P. 573 ('99); Deadwood Cent. R. Co. v. Barker, 14 S. Dak. 558, 86 N. W. 619 ('01).

is limited to this extent, that he may not thus indirectly destroy or diminish the flow of a natural surface stream to the injury of one having any prior right to the use of the waters of such stream. (20) The law relating to these waters is in its formative stage in the arid and semi-arid states, but the cases cited in the foregoing notes (21) indicate the probable lines of development as the question assumes a more important position in the irrigation system.

§ 32. Percolating and Artesian Water — California Rule.

California has recently begun to treat percolating waters almost as it does surface, or defined underground streams, and to hold that the rights of riparian or, strictly speaking, adjoining proprietors are entitled to protection from an unreasonable use of such waters.

The first case in which this question was fairly presented and from which the rule is drawn, is Katz v. Walkinshaw. (22) In this case the plaintiff was the owner of land situated above an artesian belt, and by means of artesian wells (23) was using the percolating waters under her land. The defendant, by means of other wells, was diverting and carrying water from this artesian belt to distant lands, to the injury of the plaintiff, by cutting off her supply. Upon these facts the trial court granted a nonsuit, on the ground that the waters under the lands of plaintiff and defendant, being percolating, each could take all of such water he could secure and make such use thereof as he wished. Mr. Justice Temple, in delivering the opinion for the supreme court, discussed the necessities of the country by reason of its arid climate, and said:

"Such law as has been made upon the subject comes from countries and climates where water is

(20) Cases cited note 19, §31. See, also, Taylor v. Welch, 6 Ore. 198 ('76); Platte Val. Irr. Co. v. Buckers I. & M. Co., 25 Colo. 77, 53 P. 334 ('98); Boyce v. Cupper, 37 Ore. 256, 61 P. 642 ('00); Ogilvy Irr. & L. Co. v. Insinger, 19 Colo. App. 380, 75 P. 598 ('04).

(21) See notes 19 and 20 of this section.

(22) 141 Cal. 116, 70 P. 663 ('02), 74 P. 766 ('03).

(23) *Post*, §38, artesian wells.

abundant, and its conservation and economical use of little consequence as compared with a climate like Southern California."

The maxim *"sic utere tuo"* was applied by the court to sub-surface or percolating waters in the same manner as to surface or defined streams, and it was held that while the defendant would have a right to use the percolating waters in a reasonable manner upon his own lands under which the water was found, he could not carry the water so obtained to other and distant lands to the injury of the plaintiff or others similarly situated. The judgment of the trial court was reversed and the case remanded for a new trial. A rehearing was granted, (24) and a second opinion was written by Shaw, J. The effect upon the flow of surface streams of the diversion of the percolating waters within the watershed was discussed, and the court announced that the "principles which, before the adoption of the Civil Code, were applied to protect appropriations and possessory rights in visible streams, will, in general, be found applicable to such appropriations of percolating waters, either for public or private use, and will suffice for their protection as against other appropriators. Such rights are usufructuary only, and the first taker who with diligence puts the water in use will have the better right."

In controversies between an appropriator for use on distant land and those who own land overlying the water-bearing strata, there may be two classes of such landowners: those who have used the water on their land before the attempt to appropriate, and those who have not previously used it, but who claim the right afterwards to do so. The court says: (25)

"Under the decision in this case the rights of the first class of landowners are paramount to that of one who takes the water to distant land, but the landowner's right extends only to the quantity of water that is necessary for use on his land and the appropriator may take the surplus. As to those

(24) 141 Cal. 116, 74 P. 766 ('03).
(25) Katz v. Walkinshaw, on rehearing, 141 Cal. 116, 74 P. 766, 772 ('03).

landowners who begin the use after the appropriation, and who, in order to obtain the water, must restrict or restrain the diversion to distant lands or places, it is perhaps best not to state a positive rule. Such rights are limited at most to the quantity necessary for use, and the disputes will not be so serious as those between rival appropriators. Disputes between over-lying landowners, concerning water for use on the land, to which they have an equal right, in cases where the supply is insufficient for all, are to be settled by giving each a fair and just proportion. And here again we leave for future settlement the question as to the priority of rights between such owners who begin the use of the waters at different times."

The general principles announced in this opinion, as to the right to collect, divert and appropriate percolating waters will undoubtedly be the rule in the other arid and semi-arid commonwealths. It will be noticed how the court clings to the common-law principles, yet endeavors to and does in a measure depart from them, and in the concluding sentence of the above quotation speaks of "priorities" between those who have "equal rights." But the same slavish fealty to the common law mentioned above in the Lux v. Haggin case (26) prevented it from departing entirely from the common law, which in another part of the opinion it treats as inapplicable to the conditions of that state. In Cohen v. La Canada Water Co. (27) the plaintiff drove pipes into the rocks at some springs on public land and piped off the water. Subsequently the defendant drove tunnels near by, thereby causing the water to cease flowing into the pipes. Formerly it was decided that the appropriator could follow spring water gathered in a watercourse to the very mouth of the spring, (28) but not further, (29) but this case (30) sus-

(26) *Ante*, §20.
(27) 142 Cal. 437, 76 P. 47 ('04).
(28) Ely v. Ferguson, 91 Cal. 187, 27 P. 587 ('91).
(29) Hanson v. McCue, 42 Cal. 303 ('71); Huston v. Leach, 53 Cal. 562 ('79).
(30) Cohen v. La Canada Water Co., 142 Cal. 437, 76 P. 47 ('04).

tained the appropriation of the percolating water supplying the spring. The case of McClintock v. Hudson, (31) held that the appropriation of the water of a stream also appropriates the general underground seepage down the hillsides toward the stream. The rule of prior appropriation of percolating waters is applied in these cases, and the owner of the overlying land is treated in Katz v. Walkinshaw (32) as having similar rights to those of a riparian owner.

§ 33. Subterranean Waters in Defined Channels.

Waters flowing under the ground in defined channels, the course of which can be traced, are governed by the same rules of law as streams flowing on the surface. (33) The channels and existence of such streams, though not visible, are "defined" and "known" within the meaning of the law when their course and flow are determinable by reasonable inference, and these waters are subject to appropriation and diversion under the same rules that apply to the appropriation and diversion of surface waters. (34) It is a scientific fact that below every river-bed there is a substratum flow of water seeping through the gravel, shale or soaked soil, which, if drawn off or diverted, results in a taking of the waters of the stream. This flow has been termed a "sub-surface flow," "subflow," "underflow" and "undercurrent." (35) It is appropriated by an appropriation of the stream as an incident thereof. But an appropriation of the subflow may also be made by tunneling or other

(31) 141 Cal. 275, 74 P. 849 ('03).
(32) 141 Cal. 116, 70 P. 663 ('02), 74 P. 766 ('03).
(33) Gould "On Waters," §281; Cole Silver M. Co. v. Virginia Water Co., 1 Sawy. 470; Taylor v. Welch, 6 Ore. 198 ('76); Shively v. Hume, 10 Ore. 76 ('81); Strait v. Brown, 16 Nev. 317 ('81); Keeney v. Carrillo, 2 N. M. 481 ('83); Cross v. Kitts, 69 Cal. 217 ('86).
(34) Mendano D. Co. v. Adams, 29 Colo. 317, 68 P. 431 ('02); Whitmore v. Utah Fuel Co., 26 Utah 488, 73 P. 764 ('03); Buckers Irr. Co. v. Farmers' D. Co., 31 Colo. 62, 72 P. 49 ('03); Cave v. Tyler, 147 Cal. 454, 82 P. 64 ('05).
(35) Wiel "On Water Rights," §75; Los Angeles v. Pomeroy, 124 Cal. 597, 57 P. 585 ('99); McClintock v. Hudson, 141 Cal. 275, 74 P. 849 ('03); Platte Val. I. Co. v. Buckers Irr. & Imp. Co., 25 Colo. 77, 53 P. 334 ('98); Whitmore v. Utah Fuel Co., 27 Utah 284, 73 P. 764 ('03).

appropriate works, subject only to the prior rights of other appropriators of either the surface stream or subflow. (36) In states where the common-law doctrine of riparian rights prevails, the subflow or undercurrent, being a part of the stream, cannot be diverted whether it would come to the surface or not. (37) It must flow on to the lower riparian proprietor, his rights thereto being identical with his right to the surface flow, and entitled to the same protection. (38)

§ 34. Springs.

The waters flowing from springs are subject to appropriation in the same way as are the waters of a watercourse. (39)

§ 35. Artificial Channels.

Water flowing in ditches, canals or other artificial conduits cannot be appropriated. The water is in this artificial channel through the efforts of the owner or owners of the ditch or canal, and while there its use belongs exclusively to such owner. (40)

(c) Waste, Excess or Surplus Water: Increased Volume and Overflow.

§ 36. Waste Water.

Just what constitutes waste water has not been defined by the courts. It would seem to be such

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(36) Platte Val. Irr. Co. v. Buckers Irr. & Imp. Co., 25 Colo. 77, 53 P. 334 ('98); Vineland Co. v. Azusa Co., 126 Cal. 486, 58 P. 1057 ('99); McClintock v. Hudson, 141 Cal. 275, 74 P. 849 ('03); Howcroft v. Jordan Irr. Co., 25 Utah 311, 71 P. 487 ('03); Montecito v. Santa Barbara, 144 Cal. 578, 77 P. 1113 ('04); Whitmore v. Utah Fuel Co., 27 Utah 284, 73 P. 764 ('03).

(37) *Ante*, §16.

(38) Gould "On Waters," §281.

(39) *Ante*, §26; *post*, §§39-53; Bruenning v. Dorr, 23 Colo. 195, 47 P. 290 ('96); Silver Peake Mines v. Valcalda [Nev.], 79 Fed. 886 ('97); Beaver Lead Canal Co. v. Dillon Elec. L. & P. Co., — Mont. —, 85 P. 880 ('06); see, also, 1 Mills' Ann. Stat., Colo., §2269, that expressly provides for the appropriation of waste, seepage and spring waters in same way as of running streams.

(40) Cardelli v. Comstock Tunnel Co., 26 Nev. 284, 66 P. 950 ('01); but as to the relation between a ditch or canal company and the consumer, see *post*, §118.

water as escapes from an appropriator's land after he has made all the beneficial use thereof on his land that is possible and which has not found its way into a natural stream. In a recent case (41) the supreme court of Colorado defined what was *not* waste water. In that case the plaintiff, whose land adjoined defendant's on its lower side, by means of a ditch constructed along the upper side of his land, had for years captured the water that flowed over and across defendant's fields and had used the same in irrigating. Subsequently defendants constructed a ditch along the lower side of their land and captured such water, carrying it around plaintiff's land and used it upon another tract. Plaintiff sought to restrain such action on the ground that she had appropriated the same as waste water. The court said:

"Just what constitutes waste water in every instance we do not decide, but it is unquestionably true that so far as concerns the right to make a valid appropriation of it, this water is not waste water so long as it remains upon the lands of the defendants, and does not, in any event, become such until it has escaped and reached the lands of others. The plaintiff certainly has acquired no vested right to compel the defendants to apply the waters, the right to the use of which they own, in such a way as that some of it will not soak into their own ground, but escape and pass from the surface on to her lands."

An appropriator of waste water acquires a right only to whatever water flows from the ditch or canal through which the first use is made, after the wants and necessities of the appropriators under such ditch or canal have been supplied, and such appropriation does not carry a right to any specific quantity of water, nor the right to interfere with the water flowing in such ditch or canal, and the appropriators under such ditch or canal are under no obligation to permit any specific quantity of water to be discharged as waste for his benefit. (42)

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(41) Burkhart v. Melberg, — Colo. —, 86 P. 98 ('06).
(42) Mabee v. Platte Land Co., 17 Colo. App. 476, 68 P. 1058 ('02); Burkhart v. Melberg, — Colo. —, 86 P. 98 ('06).

When such water, after being used, escapes and returns to the stream or its tributaries, it becomes a part of the water of the stream the same as though it had never been diverted, and inures to the benefit of other appropriators in the order of their appropriations and may be appropriated by a subsequent appropriator. (43) In Colorado ditches constructed for the purpose of utilizing waste, seepage or spring waters are governed by the same laws relating to priority of right as those ditches constructed for the purpose of utilizing the waters of running streams. (44)

§ 37. Surplus and Excess Water.

As we shall see later, an appropriator is only entitled to as much water as is sufficient, with reasonable use, to perform the duties for which the appropriation is made. (45) Whenever, therefore, an appropriator makes an appropriation and diversion of more water than is necessary for his purposes, the surplus or excess water over his needs remains as unappropriated water, subject to appropriation and diversion by others. (46) This principle is now established by statute in most of the states and territories. (47)

(*d*) *Artesian Wells.*

§ 38. Artesian Wells—Reward—County and Township Construction.

As we have seen, the sources from which water is obtained for irrigation are many, (48) and among these is found the artesian well. In some parts of

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(43) Gassert v. Jones, 18 Mont. 198, 44 P. 959 ('96); Water Supply, etc., Co. v. Larimer & W. Res. Co., 25 Colo. 87, 53 P. 386 ('98); La Jara Creamery & Live Stock Assn. v. Hansen, — Colo. —, 83 P. 644 ('05).

(44) 1 Mills' Ann. Stat., §2269.

(45) *Post*, §58.

(46) Larimer & Weld Irr. Co. v. Wyatt, 23 Colo. 480, 48 P. 528 ('97); Clough v. Wing, 2 Ariz. 371, 17 P. 453 ('88); Hewitt v. Story [Cal.], 64 Fed. 510; Becker v. Marble Cr. Irr. Co., 15 Utah 212, 49 P. 829 ('97); Hague v. Nephi Irr. Co., 16 Utah 421, 52 P. 765 ('98);

(47) *Post*, §§48-53.

(48) *Ante*, §§26-32.

the arid and semi-arid regions, where surface-water supplies are deficient, water, if procured at all, must be brought from the ground. (49)

The territory of Colorado was among the first, if not the first, to recognize the importance of this fact. By the act of 1870, (50) the governor and judges of the supreme court constituted a board to supervise artesian-well boring on the plains, and provision was made for the payment of a reward of $2,000 for the first successful well. This act never brought any practical results, but it has never been repealed. The *quære* naturally arises, however, if there were really any present attempt to make the act available whether or not it is not void for imposing upon judges a non-judicial duty. In the act commonly called the "Reclamation Act," (51) the secretary of the interior is "authorized and directed to make examinations and surveys for and to locate and construct * * * irrigation works for the storage, diversion and development of waters, including artesian wells." The state of Kansas, by the act of 1895, (52) provided that the board of irrigation thereby created, should test the water supply of the uplands of the western part of the state, by sinking twenty or more artesian wells, not more than one in each county. South Dakota, by the act of 1893, (53) provided that whenever fifty resident freeholders of any county should petition the engineer of irrigation for the location and establishment of an artesian well, it should be the duty of the engineer to make an investigation into the advisability of such well, and if advisable, he should locate the well at some point where it would render the greatest benefits to the lands which it would affect, and he should file a report with the county auditor of the county, giving the location of the well and an estimate of its probable cost. A board of viewers was then to be appointed by the county auditor to examine the loca-

(49) Reclamation Service 2nd Ann. Rep. 1902-3, p. 25.
(50) L. '70, pp. 11, 12.
(51) A. C., June 17, '02, §2; see *post*, §178*a*.
(52) Gen. Stat. '05, §§3919 *et seq.*
(53) Rev. Code '03, §§2648 *et seq.*

tion of the well, make maps and estimate the damage, if any, to lands in its vicinity. The report of this board was to be passed upon by the county commissioners, who were given power to hear evidence upon the question of damages, and to change the amount fixed by the viewers. An appeal could be taken from the decision of the commissioners to the circuit court. When the amount of damages, etc., was finally fixed, the commissioners were then required to call a special election, at which the electors of the county were to vote upon the question, "Shall the county commissioners issue artesian-well warrants for sinking a well at the place mentioned in the notice of election?" If the vote was in the affirmative the commissioners proceeded by calling for bids to sink the well, and could acquire by purchase, condemnation or gift, the land upon which such well would be sunk. The cost of the well, and the artesian-well warrants issued therefor, were to be paid by a special tax levied upon the lands benefited by the well as shown by the report of the board of viewers. By the act of 1891, amended in 1895, (54) provision was made for the sinking of artesian wells by civil townships and the issuance of bonds therefor. The procedure is similar to that for sinking such wells by the county. Provision is made for the collection of water rents to pay the interest on the bonds, and special taxes upon the property within such civil township to discharge the principal and any deficiency of interest. These South Dakota acts are much of the same nature as the "Wright Act," (55) although the steps to be taken to secure the results are somewhat different. They illustrate the growth of state control and state assistance, and the manner in which that assistance can be given even where there is no surface supply.

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(54) Rev. Code So. Dak. '05, §§2680 *et seq.*

(55) See *post*, §§98-103.

CHAPTER 6.

WHAT CONSTITUTES AN APPROPRIATION.

(a) *In General.*

§ 39. Appropriation Defined.

The term "appropriation," as used in the arid and semi-arid states and territories, has been defined and applied in many cases. A definition that seems to cover every application of the word, as affecting the use of water, was given in the case of Larimer County Res. Co. v. People *ex rel.* Luthe, (56) where it is said:

"Appropriation is the intent to take, accompanied by some open, physical demonstration of the intent, and for some valuable use."

A mere diversion of the water from a stream does not constitute an appropriation. Besides the intent, which naturally precedes any definite action, the appropriation consists of two things, diversion and application to beneficial use, and in case of irrigation the water must be applied to the land to make the appropriation complete. (57)

§ 40. Nature of the Right.

In California and those states following the "California System," an appropriation is treated as a grant from the federal government. Being the owner of the land, the government is also the owner of the waters passing over or past the land. It could

(56) 8 Colo. 614, 9 P. 794 ('85). See, also, Ft. Morgan L. & C. Co. v. So. Platte D. Co., 18 Colo. 1, 30 P. 1032 ('92); Tanghenbaugh v. Clark, 6 Colo. App. 235, 40 P. 153 ('95); McDonald v. Bear River Co., 13 Cal. 220 ('59); Clough v. Wing, 2 Ariz. 371, 17 P. 453 ('88); Moyer v. Preston, 6 Wyo. 308, 44 P. 845 ('96); Nevada D. Co. v. Bennett, 30 Ore. 59, 45 P. 472 ('96); Hague v. Nephi Irr. Co., 16 Utah 421, 52 P. 765 ('98); Albuquerque, etc., Co. v. Guiterrez, 10 N. M. 177, 61 P. 357 ('00); Millheiser v. Long, 10 N. M. 99, 61 P. 111 ('00); Guiterrez v. Albuquerque, etc., Co., 23 Sup. Ct. 338, 188 U. S. 545 ('03).

(57) Farmers' Ind. D. Co. v. Agricultural D. Co., 22 Colo. 513, 45 P. 444 ('96). See, also, Cash v. Thornton, 3 Colo. App. 475, 34 P. 268 ('93).

dispose of both together or either separately and apart from the other. It saw fit to recognize the early customs of the miners and other settlers, and part with the water separate and apart from the land, and the person who thereafter acquired the government's title to the land, took it subject to the easement granted by the United States to the appropriator who held his rights against the land under an express grant. (58) "Such grant has been made by congress." (59) Under the "California System," therefore, the appropriator derives his rights from the owner of the land as landowner and not law-maker. The legislative power of the state is limited to governing procedure, (60) or to matters within its police power. (61) In Colorado and the states following the "Colorado System," the doctrine of appropriation rests not on the sanction of the United States, but on the ground that the common law was unsuited to western conditions, and the United States never was entitled to the rights of a riparian proprietor because the law of the states and territories where the arid lands lie never recognized riparian rights. In these states and territories the appropriator receives his right from the state by virtue of his appropriation, the ownership of the waters being declared to be in "the state," "the people" or "the public." (62)

(*b*) *Diversion and Application to a Beneficial Use.*

§ 41. Who May Appropriate.

There are no restrictions as to those who may appropriate water. Appropriations may be made by

(58) Smith v. Hawkins, 110 Cal. 122, 42 P. 453 ('95).
(59) Smith v. Denniff, 24 Mont. 20, 60 P. 398 ('00), citing Wood v. Etiwanda Water Co., 122 Cal. 152, 54 P. 726 ('98); Welch v. Garrett, 5 Ida. 639, 51 P. 405 ('97). See, also, Carson v. Gentner, 33 Ore. 512, 52 P. 506 ('98); Howell v. Johnson [C. C. Mont.], 89 Fed. 556 ('98).
(60) Lux v. Haggin, 69 Cal. 255, 10 P. 674 ('86).
(61) White v. Farmers' Highline C. & R. Co., 22 Colo. 191, 43 P. 1028 ('96).
(62) Willey v. Decker, 11 Wyo. 32, 73 P. 210 ('03), citing Moyer v. Preston, 6 Wyo. 308, 44 P. 845 ('96); Coffin v. Left-Hand D. Co., 6 Colo. 443 ('82); Jones v. Adams, 19 Nev. 78, 6 P. 442 ('85); Reno Smelting Works v. Stephenson, 20 Nev. 269,

Indians, (63) a municipal corporation, (64) or by corporations organized under the laws of a state or territory. (65) A lessee of land may appropriate water for irrigating the land he has leased. (66) Irrigation districts, organized under the act commonly called the "Wright Act," may make a valid appropriation. (67) A corporation may also appropriate water for "renting" or "selling" to occupants of land. (68) It may be said generally that any person or corporation who diverts water from its natural channel intending to apply it to a beneficial use or to enable others to so apply it, may make a valid appropriation.(68*a*) It is the policy of the law, however, to prevent appropriations of water for speculative purposes, (69) and hence the water appropriated must be put to some beneficial use within a reasonable time. (70)

§ 42. Appropriator and Consumer Defined.

The many references to appropriations from the "natural stream" in this and other portions of the work, might seem to preclude the idea that the consumer from an artificial stream or ditch can be an appropriator, and in order to disabuse the reader's mind of such an erroneous idea the matter is here cleared up at the outset, but in a summary way and chiefly by reference to other parts of the volume, where it is treated more fully. (71) The use of the

21 P. 317 ('89); Clough v. Wing, 2 Ariz. 371, 17 P. 453 ('88); Stowell v. Johnson, 7 Utah 215, 26 P. 290 ('91); Drake v. Earhart, 2 Ida. 716, 23 P. 541 ('90); *post*, ch. 20, Property and Title, §§128-134.

(63) Lobdell v. Hall, 3 Nev. 507 ('68), Lewis, J., dissenting.

(64) City of Springville v. Fullmer, 7 Utah 450, 27 P. 577 ('91); Santa Barbara v. Gould, 143 Cal. 421, 77 P. 151 ('04).

(65) Montecito, etc., v. Santa Barbara, 144 Cal. 578, 77 P. 1113 ('04); Heyneman v. Blake, 19 Cal. 579 ('62); North Noonday M. Co. v. Orient M. Co., 6 Sawy. 299, 1 F. 522 ('80); Gould v. Maricopa, etc., Co., — Ariz. —, 76 P. 598 ('04); Combs v. Agricultural D. Co., 17 Colo. 146, 28 P. 966 ('92).

(66) Sayre v. Johnson, — Mont. —, 81 P. 389 ('05).

(67) See *post*, Part X.

(68) Wilterding v. Green, 4 Ida. 773, 45 P. 134 ('96); Albuquerque, etc., Co. v. Guiterrez, 10 N. M. 177, 61 P. 357 ('00). The question of renting and selling water is discussed in §117.

(68*a*) *Post*, §105.

(69) Toohey v. Campbell, 24 Mont. 13, 60 P. 396 ('00).

(70) *Post*, §51.

(71) *Post*, §116.

word "consumer" in this connection originated in Colorado.

Helm, J., in the Wheeler case (72) characterized the consumer (73) as the "tiller of the soil," and the ditch company as the "carrier." The use of the word "consumer," in the cases cited, was broad enough to include all of the persons using water from the canals involved; but the word in fact applies to all those who use water from natural or artificial streams for any beneficial purpose. In the arid West, however, it is a convenient term to describe those persons or corporations beneficially using water obtained through and by means of a "carrier," or ditch company.

The consumer from an artificial waterway is an appropriator from the natural stream, subject to certain rights granted the carrier by the constitution and statutes. (74) In the Southworth case, last cited, Elliott, J., said:

"From these opinions the conclusion seems inevitable that the 'better right' (Const., Art. 16, §6) acquired by priority of appropriation, is applicable to individual consumers as between themselves when they receive the water through the agency of an artificial stream, as well as when they receive the same direct from the natural stream."

This statement of the law by Elliott, J., was later adopted by the full bench in the "Wyatt case," (75) where Goddard, J., in delivering the opinion of the court, said:

"We adhere to the doctrine that such a canal company is not the proprietor of the water diverted by it, but that 'it must be regarded as an intermediate agency existing for the purpose of aiding consumers

(72) Wheeler v. Northern Colo. Irr. Co., 10 Colo. 582, 586 17 P. 487 ('87). See, also, Farmers' Highline C. & Res. Co. v. Southworth, 13 Colo. 111, 119, 21 P. 1028 ('89).

(73) In the Southworth case the same judge used the word "co-consumers" to indicate consumers taking from the same artificial stream or ditch, 13 Colo. 111, 119 ('89).

(74) Elliott, J., in Farmers' Highline C. & Res. Co. v. Southworth, 13 Colo. 111, 133-4, 21 P. 1028 ('89).

(75) Wyatt v. Larimer and Weld Irr. Co., 18 Colo. 298, 308, 33 P. 144 ('93).

in the exercise of their constitutional rights as well as a private enterprise prosecuted for the benefit of its owners.'" And upon rehearing in this same case the court, speaking of a "consumer under a ditch," said:

"He is an appropriator from the natural stream, through the intermediate agency of the ditch, and has a right to have the quantity of water so appropriated flow in the natural stream and through the ditch for his use." (75*a*)

The single act of diverting the water from a natural stream does not confer any rights upon the person or corporation making the diversion, unless the same is followed within a reasonable time by a beneficial use of the water so diverted. (76) Helm, J., in the Wheeler case, (77) said:

"To constitute a legal appropriation, the water diverted must be applied within a reasonable time to some beneficial use. That is to say, the diversion ripens into a valid appropriation only when the water is utilized by the consumer; though the priority of such *appropriation* (78) may date, proper diligence having been used, from the commencement of the canal or ditch. The constitution unquestionably contemplates and sanctions the business of transporting water for hire from natural streams to distant consumers. The Colorado doctrines of ownership and appropriation (as declared in the constitution, statutes and decisions) necessarily give the carrier of water an exceptional status: a status differing, in some particulars, from that of the ordinary common carrier. Certain peculiar rights are acquired in connection with the water diverted. It is unnecessary now, however, to enumerate these rights in detail. For the present it suffices to say that they are dependent, for their birth and continued existence, upon the use made by the consumer. But giving these rights all due significance, *I cannot consent to*

(75*a*) Wyatt case, 18 Colo. 298, 316 ('93).
(76) *Post*, §§44-45.
(77) Wheeler v. Northern Colo. Irr. Co., 10 Colo. 582, 588, 17 P. 487 ('87).
(78) The italics are our own.

the proposition that the carrier becomes a proprietor of the water diverted."

The Colorado rule was followed by New Mexico,(79) and the only dissenting view is expressed by the supreme court of Oregon in the case of Nevada Ditch Co. v. Bennett. (80) In Wyoming and the other states referred to in section 53, without any decision relating to the question, when the adjudication of the rights of priority is made, the certificates of appropriation have been issued in the name of the individual landowners or consumers instead of to the ditch or carrier of the water. (80*a*) The supreme court of Arizona discussed this question in two elaborate opinions, and held that the user of the water is the appropriator. (81) In the first case the court said:

"The warrant for the diversion of water by incorporated companies which do not own or possess arable and irrigable land must be found in the fact that they supply actual users or appropriators. Their right to divert water from a public stream depends wholly upon the use which is made of it, and is measured by the rights of its users *as appropriators*. Such a company, therefore, is to be regarded as a mere agency by which appropriations of water made by the owners or possessors of arable or irrigable land are made effective."

It would seem, therefore, that, with the exception of the doubtful decision by the Oregon court above referred to, the great weight of authority, as well as the controlling reason, is in favor of the consumer or individual who utilizes the water, and that

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(79) Albuquerque L. & Irr. Co. v. Guiterrez, 10 N. M. 177, 61 P. 357 ('00).

(80) 30 Ore. 59, 45 P. 472 ('96). In this case, the court, after discussing the Colorado decisions and pointing out the difference between the Colorado and Oregon statutes, implied that the company (carrier) which made the diversion would be the appropriator. See, also, §116 and notes.

(80*a*) *Post*, §§143, 144.

(81) Slosser v. Salt River Val. Canal Co., 1 Ariz. 376, 65 P. 332 ('01); Gould v. Maricopa Canal Co., — Ariz. —, 76 P. 598 ('04); reaffirmed in Salt River Canal Co. v. Nelssen, — Ariz. —, 85 P. 117 ('06).

he, regardless of the mode of diversion, is the appropriator and owner of the right acquired by his beneficial use. (82)

§ 43. Customs—Statutes—Water Right is Possessory Right.

The customs and decisions in the early days in California, before they were superseded by statute, fixed, as we have seen, (83) the foundation of the right of appropriation and made the use of the water for a beneficial purpose the essential thing. Ownership of the land was not a prerequisite to a valid appropriation, nor did it matter to what particular class the appropriator belonged, (84) nor for what purpose he made the appropriation, so long as its use was actually beneficial. (85) The right being a possessory right, the taking of actual possession of the water and its application to the use for which it was taken, were necessary to complete the right. (86) The early statutes of California, followed by many of the arid and semi-arid states, (87) are largely, if not chiefly declaratory of the early customs as recognized by the decisions of the courts.

§ 44. Diversion and Use—Statute—Doctrine of Relation—California-Colorado-Nevada Rule—Map and Statement.

In those states where there is a statute upon the subject, a failure on the part of the appropriator to follow the statutory procedure (88) relative to perfecting an appropriation does not necessarily invali-

(82) For a fuller discussion of this question and citation of cases, see §108.
(83) *Ante*, §§7-11.
(84) *Ante*, §41.
(85) *Post*, §45.
(86) Conger v. Weaver, 6 Cal. 548 ('56); Thomas v. Guiraud, 6 Colo. 530 ('83). See, also, cases cited, §39, note 56.
(87) Washington, Ballinger's Codes, '97, §4092; Montana Civ. Code, '95, §§1880-1892; Amd. Stats. '01, p. 152; Kansas, Gen. Stats. '01, §§3609-3613; Nevada, Comp. L. '00, 356 *et seq.*; Utah, Rev. Stats. '98, §§1261-1275, superseded by Act '05, p. 145; Oregon, Hill's Ann. Laws, p. 1930, §§1-9. See, also, Farmers' Highline C. & R. Co. v. Southworth, 13 Colo. 111, 21 P. 1028 ('89).
(88) *Post*, §§48-51.

date his appropriation. By such a failure he waives his right to have the date of his priority relate back (89) to the commencement of the work, and instead it is fixed by the date when the water is first beneficially applied to the land. Such an appropriation will be valid against all subsequent appropriators. But an appropriator, by such neglect or oversight, always runs the risk of some person subsequently following the statutory method, and thus securing the benefit of the doctrine of relation. (90) Such a statutory appropriator, should he commence the work of construction before the former had succeeded in beneficially applying the water to his land, would acquire by virtue of the doctrine of relation a prior right to the amount of water necessary for his use. (91) As between the government of the state and the appropriator, the requisites are diversion and beneficial use; (92) as between rival claimants the state government demands a strict compliance with the statutory provisions. (93)

In Colorado the courts have followed the California-Nevada rule, (94) and regardless of the filings have held that, "although the appropriation is not deemed complete until the actual diversion or use of the water, still if such work (construction) be prosecuted with reasonable diligence, the right relates to the time when the first step was taken to secure it." (95) In 1881 a statute was enacted in Colorado requiring

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(89) *Post*, §§48, 49.

(90) *Post*, §48.

(91) As to the doctrine of relation, see *post*, §48.

(92) Mitchell v. Canal Co., 75 Cal. 464, 17 P. 246 ('88); De Necochea v. Curtis, 80 Cal. 397, 20 P. 563, 22 P. 598 ('89).

(93) Burrows v. Burrows, 82 Cal. 564, 23 P. 146 ('90); Waterson v. Saldunbehere, 101 Cal. 107, 35 P. 432 ('94); Murray v. Tingley, 20 Mont. 260, 50 P. 723 ('97); Hague v. Nephi Irr. Co., 16 Utah 421, 52 P. 765 ('98); Millheiser v. Long, 10 N. M. 99, 61 P. 111 ('00); Oregon Const. Co. v. Allen D. Co., 41 Ore. 209, 69 P. 455 ('02).

(94) Kelley v. Natoma W. Co. 6 Cal. 105 ('56); Ophir M. Co. v. Carpenter, 4 Nev. 544 ('69).

(95) Sieber v. Frink, 7 Colo. 148, 2 P. 901 ('83); Larimer Co. Res. Co. v. People, 8 Colo. 614, 9 P. 794 ('85); Wheeler v. Northern Colo. Irr. Co., 10 Colo. 582, 17 P. 487 ('87); Colo. L. & W. Co. v. Rocky Ford C. R. L. & T. Co., 3 Colo. App. 545, 34 P. 580 ('93). As to doctrine of relation, see *post*, §48.

an appropriator constructing or enlarging diverting works of a carrying capacity of more than one cubic foot per second of time, to file certain maps and statements within 90 days after commencing his construction work, if he would have the date of his priority relate back to the commencement of his work, and if he failed to make such filings within the 90 days, his priority would date from the time when the filings were made. (96) This act was declared void, (97) and a new and similar act enacted in 1903. (98) But it was held by the court of appeals, (99) that a compliance with the act of 1881 was not necessary to perfect a valid appropriation.

§ 45. Application to Beneficial Use.

The appropriation is not completed until the water, diverted from its natural channel, has been applied to the beneficial use for which it was intended. (100) What is a beneficial use can only be ascertained from decisions relating to various uses. It may be stated generally, however, that the diversion and use of water, for mining and manufacturing to propel machinery in mills and factories, to irrigate land for the production of crops, (101) and to furnish water to the citizens of a municipality for drinking and other domestic and useful purposes, are within the meaning of the term. (102) It has been held

(96) 1 Mills' Ann. Stat., §2265; *post*, §50.
(97) Lamar C. Co. v. Amity L. & I. Co., 26 Colo. 370, 58 P. 600 ('99); Rio Grande L. & C. Co. v Prairie D. Co., 27 Colo. 225, 60 P. 726 ('00).
(98) 3 Mills' Ann. Stat. (2d ed.), §§2265*a-g*.
(99) Beaver Brook R. Co. v. St. Vrain R. Co., 6 Colo. App. 130, 40 P. 1066 ('95).
(100) Fort Morgan L. & C. Co. v. So. Platte D. Co., 18 Colo. 1, 30 P. 1032 ('92); Farmers' Ind. Co. v. Agricultural D. Co., 22 Colo. 513, 45 P. 444 ('96); Cash v. Thornton, 3 Colo. App. 475, 34 P. 268 ('93); Larimer, etc., Res. Co. v. Cache La Poudre I. Co., 8 Colo. App. 237, 45 P. 525 ('96). See, also, cases cited in note 102.
(101) Basey v Gallagher, 87 U. S. [20 Wall.], 670 ('74).
(102) Gould "On Waters," §233. Irrigation and agricultural purposes—Tartar v. Spring Cr. Co., 5 Cal. 396 ('55); McDonald v. Bear River Co., 13 Cal. 220, 15 Cal. 145 ('59); Yunker v. Nichols, 1 Colo. 551 ('72); Shilling v. Rominger, 4 Colo. 100 ('78); Sieber v. Frink, 7 Colo. 148, 2 P. 901 ('83); Larimer Co. Res. Co. v. People, 8 Colo. 614, 9 P. 794 ('86); Platte Water Co. v. Northern Colo. Irr. Co., 12 Colo. 525, 21 P. 711 ('89); Farmers, etc., Co. v.

that the careless running of water occasionally over untilled, uncropped, uncleaned land will not constitute a beneficial use. (103) The cutting of wild grass produced by the natural overflow of a river, is not such a beneficial use as will support an appropriation of such overflowing water. (104) The diversion of water on to a flat meadow, by Indians, for the purpose of catching fish which they were unable to catch while in the narrow channel of a stream, was held to be a beneficial use. (105) An appropriation for the sale of water is also a beneficial use. (106) It is as necessary to make a beneficial use of the water appropriated by the method provided by the statutes and codes of the different states, as it was under the early customs and decisions of the courts, for it is generally expressly provided by statute in the arid and semi-arid states and territories, that the water must be applied to a beneficial use. (107)

§ 46. Change of Point of Diversion.

If, by the washing out and deepening of the bed of the stream, or by a change of its channel, or for any other reason, an appropriator desires to change the point at which he diverts the water from the natural channel, he may do so upon condition that he

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Southworth, 13 Colo. 111, 21 P. 1028 ('89); Dick v. Bird, 14 Nev. 161 ('79); Dick v. Caldwell, 14 Nev. 167 ('79); Murray v. Tingley, 20 Mont. 260, 50 P. 723 ('97); Sayre v. Johnson, — Mont. —, 81 P. 389 ('05); Crane v. Winsor, 2 Utah 248 ('79); Munroe v. Ivie, 2 Utah 535 ('80); Nevada D. Co. v. Bennett, 30 Ore. 59, 45 P. 472 ('96); Brown v. Baker, 39 Ore. 66, 65 P. 799 ('01); Pyke v. Burnside, — Ida. —, 69 P. 477 ('02); Lone Tree D. Co. v. Rapid City, etc., Co., 16 So. Dak. 451, 93 N. W. 650 ('03). Mechanical, mining and manufacturing—Irwin v. Phillips, 5 Cal. 140 ('55); McDonald v. Bear River Co., 13 Cal. 220, 15 Cal. 145 ('59); Platte Water Co. v. Northern Colo. Irr. Co., 12 Colo. 525, 21 P. 711 ('89); Woolman v. Garringer, 1 Mont. 535 ('72). Municipal purposes—Platte Water Co. v. Northern Colo. Irr. Co., 12 Colo. 525, 21 P. 711 ('89); Lone Tree D. Co. v. Rapid City, etc., Co., 16 So. Dak. 451, 93 N. W. 650 ('03).

(103) Millheiser v. Long, 10 N. M. 99, 61 P. 111 ('00).

(104) Walsh v. Wallace, 26 Nev. 299, 67 P. 914 ('02).

(105) Lobdell v. Hale, 3 Nev. 460 ('68).

(106) Irwin v. Phillips, 5 Cal. 140 ('55); Wilterding v. Green, 4 Ida. 773, 45 P. 134 ('96); Albuquerque, etc., Co. v. Gutierrez, 10 N. M. 177, 61 P. 357 ('00).

(107) See statutes, *post*, Part X.

does not injure or interfere with any prior or subsequent appropriator. (108) This is practically the only limitation imposed upon the right. (109) In Utah (110) the change must be reported to the state engineer, accompanied by maps showing the change, and a failure to file such report and maps is a misdemeanor. In Colorado (111) a regular proceeding is provided for making the change in the district court, and in each case the change, if made, is evi-

(108) Kidd v. Laird, 15 Cal. 161 ('60); Butte Table Mt. Co. v. Morgan, 19 Cal. 609 ('62); Davis v. Gale, 32 Cal. 27 ('67); Junkans v. Bergin, 67 Cal. 267, 7 P. 684 ('85); Ware v. Walker, 70 Cal. 591, 12 P. 475 ('86); Ramelli v. Irish, 96 Cal. 214, 31 P. 41 ('92); McGuire v. Brown, 106 Cal. 660, 39 P. 1060 ('95); Hargrave v. Cook, 108 Cal. 72, 41 P. 18 ('95); Charncock v. Higuerra, 111 Cal. 473, 44 P. 171 ('96); Santa Paula, etc., Co. v. Peralta, 113 Cal. 38, 45 P. 168 ('96); Smith v. Corbit, 116 Cal. 587, 48 P. 725 ('97); Vineland, etc., Co. v. Azusa, etc., Co., 126 Cal. 486, 58 P. 1057 ('99); Beyers v. Colonial, etc., Co., 134 Cal. 553, 66 P. 732 ('01); Craig v. Crafton, etc., Co., 141 Cal. 178, 74 P. 762 ('03); So. Cal., etc., Co. v. Wilshire, 144 Cal. 68, 77 P. 767 ('04); Columbia M. Co. v. Holter, 1 Mont. 296 ('71); Alder Gulch, etc., Co. v. Hayes, 6 Mont. 31, 9 P. 581 ('86); Meagher v. Hardenbrook, 11 Mont. 385, 28 P. 451 ('91); Middle Cr. D. Co. v. Henry, 15 Mont. 558, 39 P. 1054 ('95); Hayes v. Buzzard, 31 Mont. 74, 77 P. 423 ('04); Smith v. Logan, 18 Nev. 149, 1 P. 678 ('83); Coffin v. L. H. D. Co., 6 Colo. 443 ('82); Thomas v. Guiraud, 6 Colo. 530 ('82); Sieber v. Frink, 7 Colo. 148, 2 P. 901 ('83); Hammond v. Rose, 11 Colo. 524, 19 P. 466 ('88); Fuller v. Swan River Min. Co., 12 Colo. 12, 19 P. 836 ('88); Strickler v. Colo. Springs, 16 Colo. 61, 26 P. 313 ('91); Greer v. Heiser, 16 Colo. 306, 26 P. 770 ('91); Wyatt v. Larimer, etc., Co. 1 Colo. App. 480, 29 P. 906 ('92); Nichols v. McIntosh, 19 Colo. 22, 34 P. 280 ('93); Knowles v. Clear Cr., etc., Co., 18 Colo. 209, 32 P. 279 ('93); Cache La Poudre, etc., Co. v. Water, etc., Co., 25 Colo. 161, 53 P. 331 ('98); Handy D. Co. v. Louden I. C. Co., 27 Colo. 515, 62 P. 847 ('00); New Cache La Poudre, etc., Co. v. Water, etc., Co., 29 Colo. 469, 68 P. 781 ('02); Ft. Lyon Canal Co. v. Chew, 1 Colo. Dec. Supp. 490 ('02); Fluke v. Ford, — Colo. —, 84 P. 469 ('05); Tolman v. Casey, 15 Ore. 83, 13 P. 669 ('87); Cole v. Logan, 24 Ore. 304, 33 P. 568 ('93); Bolter v. Garrett, 44 Ore. 304, 75 P. 142 ('04); Hague v. Nephi Irr. Co., 16 Utah 421, 52 P. 765 ('98); Miller v. Douglass, 7 Ariz. 41, 60 P. 722 ('00); Walker v. McGinness, 8 Ida. 540, 69 P. 1003 ('02); Hard v. Boise, etc., Co., 9 Ida. 589, 76 P. 331 ('04); see, also, Cal. Civ. Code, §§1412-1415; Colo., 3 Mills' Ann. Stat. (2d ed.), §§2273*d*-2273*j*; Nebraska, Comp. Laws '05, §6403; New Mexico, Sess. L. '05, p. 270, §6; Oklahoma, Sess. L. '05, p. 274, §10; South Dakota, Sess. L. '05, p. 201, §48; Wyoming, Sess. L. '05, p. 147.

(109) See cases cited in preceding note.

(110) Sess. L. '05, p. 160, §53.

(111) Sess. L. '99, p. 235, 3 Mills' Ann. Stat. (2d ed.), §2273*d*, etc.

denced by a decree. This statute was passed upon and construed by the supreme court of Colorado, in the case of New Cache La Poudre Irr. Co. v. Water Sup. & Stor. Co., (112) in which case the court held that the act is valid, and provides an exclusive remedy and method of making the change, and that it applies as well where the qualified right to make such change existed prior to the passage of the act. That the objects of the statute are, *inter alia*, to protect public officers in distributing water for irrigation, to preserve the peace and avoid a multiplicity of suits and their necessary costs, and parties may not by their conduct or by waiving their purely private rights render nugatory such statute, or relieve a person desiring to make such change from following the procedure prescribed, and it is the duty of the court to enforce the statute *sua sponte*, to require that all persons who may be affected by the desired change be notified of the proceeding and given an opportunity to be heard. (113) The change of the point of diversion under these statutes has already produced considerable litigation, and presents most interesting and important questions for solution. In this state, in the district court of Montrose county, a case was brought under the statute (114) to change the point of diversion of priorities 2, 3 and 4, from a point very near the mouth of the Uncompahgre river, to a point about thirty miles up the stream. Every mile between the two points has several irrigating ditches and canals, and between these points also is taken out the water supply for the town of Montrose, and water power for a flour mill. The district court denied the right to change, because of the injury that would result to the appropriators whose points of diversion were between. It is true that every additional cubic foot of water flowing down a stream which has but a limited flow, assists by that much the flow of the stream, and reduces, in proportion, the

(112) 29 Colo. 469, 68 P. 781 ('02).
(113) To similar effect see *In re* Priorities of Water Rights in Water Dist. No. 17, 1 Colo. Dec. Supp. 8 [Colo.] ('00).
(114) 3 Mills' Ann. Stat. (2d ed.), §2273*d*, etc.

loss by seepage and evaporation, and any such change of point of diversion as was attempted in the case referred to, where the amount of water involved exceeded 15 cubic feet, would undoubtedly have worked a material injury to those whose points of diversion were between the old point of diversion and the proposed new one. In each case, too, it makes no difference whether the appropriators to be affected by the change have rights prior or subsequent to the rights of the appropriator seeking to make the change. A subsequent appropriator makes his appropriation subject to all prior appropriations as they exist at the time he appropriates, and his rights to a continuance of those conditions are protected by law, the same as those of a prior appropriator. (115)

§ 47. Change of Place and Manner of Use.

We have seen that under the principle of appropriation water may be used upon land however situated, whether riparian or remote from the natural stream, even upon another watershed, and that practically all purposes for its use are proper, if they are beneficial. As with the change of the point of diversion, (116) so it is with the change of the place or manner of use. No change can be made to the injury or disadvantage of other appropriators, or in those states following the "California System," to the prejudice of existing riparian proprietors. If the change of place or manner of use necessitates the diversion of a greater quantity of water, or consumes and keeps from other appropriators a greater quantity than the amount originally appropriated, the change will not be permitted. (117) In Colorado it is held

(115) Ortman v. Dixon, 13 Cal. 33 ('59); McDonald v. Bear River Co., 13 Cal. 220 ('59); McKinney v. Smith, 21 Cal. 374 ('63); Smith v. Corbit, 116 Cal. 587, 48 P. 725 ('97); Handy D. Co. v. Louden Irr. C. Co., 27 Colo. 515, 62 P. 847 ('00), and cases cited in note 108.

(116) See *ante*, §46.

(117) Ortman v. Dixon, 13 Cal. 33 ('59); McDonald v. Bear River Co., 13 Cal. 220 ('59); McKinney v. Smith, 21 Cal. 374 ('63); Davis v. Gale, 32 Cal. 27 ('67); Santa Paula, etc., v. Peralta, 113 Cal. 38, 45 P. 168 ('96); San Luis Water Co. v. Estrada, 117

that where water is appropriated for the purpose of furnishing power to a mill and after its use in the mill is permitted to flow, undiminished, back into the natural stream, it becomes subject to another appropriation, and when so appropriated the mill appropriator can not change the character of use or place of diversion in such manner as to injure or deprive the latter appropriator below the mill of his use of the water. (118) The sole question for determination is whether or not any other appropriator is injured or put to any disadvantage by the change. This is a question of fact, and is to be determined from the facts and circumstances of each particular case. (119)

Cal. 168, 48 P. 1075 ('97); Woolman v. Garringer, 1 Mont. 535 ('72); Meagher v. Hardenbrook, 11 Mont. 385, 28 P. 451 ('91); Middle Cr. D. Co. v. Henry, 15 Mont. 558, 39 P. 1054 ('95); Gassert v. Jones, 18 Mont. 216, 44 P. 959 ('96); Power v. Switzer, 21 Mont. 523, 55 P. 32 ('98); Smith v. Denniff, 24 Mont. 20, 60 P. 398 ('00); Hayes v. Buzzard, 31 Mont. 74, 77 P. 423 ('04); Coffin v. Left-Hand D. Co., 6 Colo. 443 ('82); Thomas v. Guiraud, 6 Colo. 530 ('82); Hammond v. Rose, 11 Colo. 524, 19 P. 466 ('88); Fuller v. Swan River, etc., Co., 12 Colo. 12, 19 P. 836 ('88); Strickler v. City Colo. Springs, 16 Colo. 61, 26 P. 313 ('91); Greer v. Heiser, 16 Colo. 306, 26 P. 770 ('91); Wyatt v. Larimer and Weld Irr. Co., 1 Colo. App. 480, 29 P. 906 ('92); Nichols v. McIntosh, 19 Colo. 22, 34 P. 280 ('93); Knowles v. Clear Cr., etc., Co., 18 Colo. 209, 32 P. 279 ('93); Larimer and Weld Res. Co. v. Cache La Poudre Irr. Co., 8 Colo. App. 237, 45 P. 525 ('96); Cache La Poudre Res. Co. v. Water Sup. & S. Co., 25 Colo. 161, 53 P. 331 ('98); King v. Ackroyd, 28 Colo. 488, 66 P. 906 ('01); City of Telluride v. Davis, — Colo. —, 80 P. 1051 ('05); Smith v. Logan, 18 Nev. 149, 1 P. 678 ('83); Trambley v. Luterman. 6 N. M. 15, 27 P. 312 ('91); Wimer v. Simmons, 27 Ore. 1, 39 P. 6 ('95); Nevada Ditch Co. v. Bennett, 30 Ore. 59, 45 P. 472 ('96); Hague v. Nephi I. Co., 16 Utah 421, 52 P. 765 ('98); Mahoney v. Neiswanger, 6 Ida. 750, 59 P. 560 ('99); Hard v. Boise City Irr. & L. Co., 9 Ida. 589, 76 P. 331 ('04); Biggs v. Utah Irr. D. Co., 7 Ariz. 331, 64 P. 494 ('01); Farmers' & Merch. Irr. Co. v. Gothenburg W. P. & Irr. Co., — Neb. —, 102 N. W. 487 ('05).

(118) Cache La Poudre Res. Co. v. Water Sup. & S. Co., 25 Colo. 161, 53 P. 331 ('98); see, also, Trambley v. Luterman, 6 N. M. 15, 27 P. 312 ('91); Gassert v. Jones, 18 Mont. 216, 44 P. 959 ('96).

(119) See cases cited *supra*, note 117.

(c) *Statutory Requirements.*

§ 48. The Doctrine of Relation—Early Decisions.

By the doctrine of relation is meant that principle by which an act done at a certain time is considered by a fiction of the law to have been done at some antecedent time. It is usually applied where several proceedings are essential to complete a particular transaction, the last proceeding which consummates the transaction being held for certain purposes to take effect by relation as of the day when the first proceeding was had. (120) This doctrine had become an accepted fiction of the law long before it was applied in the arid and semi-arid states and territories. (121) One of the first questions to be settled by the courts, was that of fixing the date from which a completed appropriation would accrue. The appropriation is completed by taking actual possession of the water and applying it to a beneficial use. One appropriator, from the nature and size of his diverting works or the situation of his land, or both, might be able to complete his construction work, take actual and physical possession of the water, and apply it to a beneficial use, in a much shorter space of time than another, and therefore the doctrine of relation was invoked to protect the appropriator in the rights he would acquire by the use of ordinary diligence. (122) As was said in the case of Conger v. Weaver (123):

"In the case of constructing canals under the (*implied*) license from the state, the survey of the ground, planting stakes along the line, and actually commencing and diligently pursuing the work, is as much possession as the nature of the subject will admit, and forms a series of acts of ownership which must be conclusive of the right." (124)

(120) Gibson v. Chouteau, 13 Wall. (U. S.) 100 ('71); Ormiston v. Trumbo, 77 Mo. App. 316.
(121) Clarke v. White, 12 Pet. (U. S.) 178 (1838); Astrom v. Hammond, Fed. cases No. 596 (1837).
(122) *Post*, §49.
(123) 6 Cal. 548, 65 Am. Dec. 528 ('56).
(124) As to the doctrine of relation applied to the diversion of water, see *ante*, §44.

The conclusion thus announced became the rule of decision and custom throughout the arid and semi-arid states and territories before the enactment of any statute relating to the question, and it was generally held that, while the rights of the appropriator of water do not become absolute until the appropriation is completed by the actual application of the water to the use designed, nevertheless, where he has been diligent in completing the work of appropriation, and has completed it within a reasonable time, as against other appropriators, his rights will relate back to the time of the commencement of the work. (125) This has been the rule in Colorado, independent of statute, from the very earliest days. (126) This rule of decision has, in most of the states and territories, been supplemented by statute, (127) until in all but one or two of the states and territories the date of the priority of an appropriation is easily ascertained in every commonwealth. (128)

§ 49. Doctrine of Relation—Posting Notice—Early Statutes.

The early statutes in all of the arid or semi-arid states and territories were in reality a legislative recognition of the decisions and customs relative to the appropriation of water. Not realizing at that time the vast importance and value of the rights that appropriators were securing, (129) the legisla-

(125) Conger v. Weaver, 6 Cal. 548, 65 Am. Dec. 528 ('56); Parker v. Kilham, 8 Cal. 78, 68 Am. Dec. 310 ('57); Osgood v. El Dorado Water & D. G. M. Co., 56 Cal. 571 ('80); Woolman v. Garringer, 1 Mont. 535 ('72); Ophir Silver M. Co. v. Carpenter, 4 Nev. 544 ('69); Irwin v. Strait, 18 Nev. 436, 4 P. 1215 ('84); Sieber v. Frink, 7 Colo. 148, 2 P. 901 ('83); Water Sup. & Stor. Co. v. Larimer and Weld Irr. Co., 24 Colo. 322, 51 P. 496 ('97); Colo. L. & Water Co. v. Rocky Ford Canal, etc., Co., 3 Colo. App. 545. 34 P. 580 ('93); Keeney v. Carillo, 2 N. M. 480 ('83); Cole v. Logan, 24 Ore. 304, 33 P. 568 ('93); Nevada Ditch Co. v. Bennett, 30 Ore. 59, 45 P. 472 ('96).

(126) *Post*, §49; also *ante*, §44.

(127) *Post*, §49.

(128) *Post*, §§49, 51-53.

(129) In speaking of the great value of appropriated water, Shaw, J., in Katz v. Walkinshaw, 141 Cal. 116, 74 P. 766 ('03), said: "In some instances it has been known to sell at the rate of $50,000.00 for a stream flowing at the rate of a cubic foot per second."

ture took no great precaution to safeguard the interests of the state or of the later comer and permitted the prerequisites of appropriation to remain in a form both loose and simple. The California code, declaratory chiefly of the early customs and decisions, and which is practically unchanged at the present day, furnished the model that was followed by the legislatures of Washington, (130) Arizona, (131) Idaho, (132) Kansas, (133) Montana, (134) Utah, (135) and Oregon. (136)

Under this system the fundamental principle is the taking possession of the water by completing the means to be used for diverting and carrying it, and applying the water to the intended use. (137) The provisions of the statute are primarily to establish the procedure whereby a certain definite time might be fixed as the date when the title would accrue by relation. (138) These statutes (139) require the appropriator to post a notice on the bank of the stream containing a declaration of the appropriator's intention to take the water, also the quantity of water to be taken and the place where it is to be used. A copy of this notice must, within the time specified in the statute, (140) be filed with the county clerk or recorder of the county in which the diversion is to be made. Upon compliance with these statutory provisions he can then claim the date of his priority either from the date of the posting of this notice or

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(130) Pierce's Code, 1905, §§5131-5139.
(131) Rev. Stat. '01, p. 1042, §4169.
(132) 2 Ida. Codes, §2583. Idaho now has the new irrigation code, *post*, §50.
(133) Gen. Stat. '05, §3791 *et seq.*
(134) Civ. Code '95, §§1880-1892, Am'd Sess. L. '01, p. 152.
(135) Rev. Stat. '98, §§1261-1275. Utah now has the new irrigation code, *post*, §53.
(136) Hill's Ann. Laws, p. 1930, §§1-9; but see Gen. L. '05, p. 401.
(137) Conger v. Weaver, 6 Cal. 548 ('56).
(138) De Necochea v. Curtis, 80 Cal. 397, 20 P. 563, 22 P. 198 ('89); Wells v. Mantes, 99 Cal. 583, 34 P. 324 ('93).
(139) Arizona, California, Kansas, Montana, Oregon and Washington. Idaho and Utah had similar provisions prior to the recent adoption of the irrigation codes. See *supra*, notes 132 and 135.
(140) *Post*, statutes, Part X.

from the date of the actual commencement of the work; (141) provided, however, he begins his work of construction within a reasonable time and prosecutes it to completion with reasonable diligence, and also within a reasonable time makes a beneficial application of the water to the use for which it is intended. This is known as the doctrine of relation, (142) and the statutes are but a recognition of the early decisions or customs. (143) Colorado has never enacted a statute requiring the posting of a notice nor the doing of any other act prior to the commencement of the work. In 1881 an act was passed requiring certain statements and maps to be filed after the work was commenced, (144) but this act was subsequently declared unconstitutional. (145) The courts of Colorado, however, recognized and enforced the doctrine of relation regardless of this statute. (146) In Sieber v. Frink, the court said:

"We accept the rule adopted in California and Nevada in this connection. This rule is stated as follows: 'Although the appropriation is not deemed complete until the actual diversion or use of the water, still if such work be prosecuted with reasonable diligence, the right relates to the time when the first step is taken to secure it.' " (147)

(141) See statutory provisions, *post*, Part X.

(142) *Ante*, §§42-46; Woolman v. Garringer, 1 Mont. 535 ('72); Nevada D. Co. v. Kidd, 37 Cal. 282 ('69); Union Mill Co. v. Dangberg [Nev.], 81 Fed. 73 ('97).

(143) Cases cited in note 142. Also Wells v. Mantes, 99 Cal. 583, 34 P. 324 ('93); Nevada Ditch Co. v. Bennett, 30 Ore. 59, 45 P. 472 ('96); Morgan v. Shaw, — Ore. —, 83 P. 534 ('06); Murray v. Tingley, 20 Mont. 260, 50 P. 723 ('97); Pyke v. Burnside, — Ida. —, 69 P. 477 ('02); Sand Pt. W. & L. Co. v. Panhandle Dev. Co., — Ida. —, 83 P. 347 ('05). Idaho now has the new irrigation code, *post*, ch. 36. For an appropriation made in Oregon prior to the adoption of the act of 1905, see Morgan v. Shaw, — Ore. —, 83 P. 534 ('06); also Brown v. Newell, — Ida. —, 85 P. 385 ('06), for appropriation made prior to the adoption of the irrigation code in Idaho.

(144) 1 Mills' Ann. Stat., §2265; see *ante*, §44, *post*, §52.

(145) *Post*, §52.

(146) Sieber v. Frink, 7 Colo. 148, 2 P. 901 ('83); Larimer Co. Res. Co. v. People, 8 Colo. 614, 9 P. 794 ('85); Wheeler v. Northern Colo. Irr. Co., 10 Colo. 582, 34 P. 580 ('93); Colo. Land & W. Co. v. Rocky Ford C. R. L. L. & T. Co., 3 Colo. App. 545, 34 P. 580 ('93).

(147) Sieber v. Frink, 7 Colo. 148, 2 P. 901 ('83).

In Larimer County Reservoir Co. v. People, (148) the court said:

"The appropriation thereof is, in legal contemplation, made when the act evidencing the intent is performed." And again, in Wheeler v. Northern Colorado Irr. Co., (149) it is stated:

"The priority of such appropriation may date, proper diligence having been used, from the commencement of the canal or ditch."

These decisions do not fix a definite time for ascertaining the date of the priority, leaving it for future determination whether the date would be fixed by the time when the survey is made or by the actual commencement of work on the ditch or canal. The appropriation of water for storage and reservoir purposes, as well as appropriations of underground waters, are made in the same manner as appropriations for irrigation, or of surface waters, and the doctrine of relation will apply, and the priority date from the beginning of the work. (150)

§ 50. Effect of Posting Notice.

The notice provided for by the statutes referred to in sec. 46 does not withdraw the water from appropriation by others, but operates as a warning to them, that later on, when the claimant shall have completed his ditch, canal or other diverting works, he will have a right to a certain quantity of water as of the date when the notice was posted, or the work of construction commenced. (151) Others may come in and temporarily use the water, and unless they interfere with the claimant's construction work, no right of action will accrue. (152) The claimant need take

(148) 8 Colo. 614, 9 P. 794 ('85).
(149) 10 Colo. 582, 17 P. 487 ('87).
(150) Storage and reservoir purposes—Water Supply & Storage Co. v. Larimer and Weld Irr. Co., 24 Colo. 322, 51 P. 496 ('97); Cache La Poudre Res. Co. v. Windsor Res & Canal Co., 25 Colo. 53, 52 P. 1104 ('98). Appropriations of underground waters—Vineland Irr. Dist. v. Azusa Irr. Co., 126 Cal. 486, 58 P. 1057 ('99); Katz v. Walkinshaw, 141 Cal. 116, 70 P. 663 ('02).
(151) See statutes, *post*, Part X.
(152) Nevada Water Co. v. Kidd, 37 Cal. 282 ('69); Salt Lake City v. Salt Lake Co., 24 Utah 249, 67 P. 672 ('02); Rincon Co. v. Anaheim Co. [Cal.], 115 Fed. 543 ('02); Woolman v. Gar-

no notice of intervening claimants who make such temporary appropriations, for, if he prosecutes his construction work diligently, and completes his diverting works and applies the water to a beneficial use within a reasonable time, the date of his priority will, by reason of the statute, relate back to and be fixed by the date of posting the notice. (153) This, in fact, was the recognized rule before the statute was enacted. (154) A failure to post such a notice, or the posting of a defective notice, has been held to be a waiver of the advantages of the statute, (155) but it does not affect the work if completed before others intervene, for. as we have seen, the appropriation may be perfected by diversion and beneficial use of the water. (156) As between two claimants who both failed to post the notice, he who first completed his diversion and application and made beneficial use of the water would undoubtedly be given the prior right.

§ 51. Diligence and Reasonable Time.

Diligence has been defined to be "the steady application to business of any kind, constant effort to accomplish any undertaking." (157) Under the customs of the early settlers, and the decisions of the courts prior to any statutory enactments, the appropriator was required to be diligent and to complete the construction of his diverting works and the application of the water to a beneficial use within a reasonable time. (158) This has been the rule of decision in Colorado from the date of the early appro-

ringer, 1 Mont. 535 ('72); Ore. Const. Co. v. Allen D. Co., 41 Ore. 209, 69 P. 455 ('02).

(153) Nevada Water Co. v. Kidd, 37 Cal. 282 ('69); Salt Lake City v. Salt Lake Water & Elec. Co., 24 Utah 249, 67 P. 672 ('02); Rincon Water & Power Co. v. Anaheim Union W. Co., [Cal.], 115 Fed. 543 ('02).

(154) *Ante*, §§48, 49.

(155) Taylor v. Abbott, 103 Cal. 421, 37 P. 408 ('94).

(156) *Ante*, §§44, 45; Wells v. Mantes, 99 Cal. 583, 34 P. 324 ('93); Murray v. Tingley, 20 Mont. 260, 50 P. 723 ('97).

(157) Ophir Silver M. Co. v. Carpenter, 4 Nev. 534 ('69).

(158) Conger v. Weaver, 6 Cal. 548 ('56); Hewitt v. Story [Nev.], 64 Fed. 510 ('94); Union Mine Co. v. Dangberg [Nev.], 81 Fed. 73 ('89); Rodgers v. Pitt [Nev.], 129 Fed. 932 ('98).

priations to the present day, (159) practically without any statutory provision. The act of 1881, (160) touching the subject, was declared unconstitutional, (161) and the act of 1903 (162) contains merely a recognition of the previously existing custom and rule of decision, by a proviso which reads:

"Nothing herein contained shall be so construed as to dispense with the necessity for due diligence in the construction of such projects."

The use of the words "due diligence" and "reasonable time," in the early statutes of most of the states and in the present irrigation laws of some of the states, was and is a statutory recognition of the pre-existing custom and rule of decision. Their use, however, was concurrent and perhaps provoked much litigation because there was no definite rule of decision by which a particular case could be determined. The court ascertained from the facts in each particular case, whether or not the claimant had used "due diligence," and completed the application of the water within a "reasonable time." In determining these questions, the courts took into consideration the size of the diverting works constructed by the claimant, the character of the work, whether or not it was to any extent rock work or simple excavation, the length of the working season, the regularity with which the claimant prosecuted the work of construction, and from these and other pertinent facts determined whether or not "due diligence" had been used to complete the work in a "reasonable time." (163) Illness or lack of pecuniary means being incident to the person and not to the work,

(159) Highland D. Co. v. Mumford, 5 Colo. 325 ('80); Sieber v. Frink, 7 Colo. 148, 2 P. 901 ('83); Farmers' Highline C. & Res. Co. v. Southworth, 13 Colo. 111, 21 P. 1028 ('89); Colo. Land & W. Co. v. Rocky Ford C. R. L. L. & T. Co., 3 Colo. App. 545, 34 P. 580 ('93); Beaver Brook Res. & C. Co. v. St. Vrain Res. & Fish Co., 6 Colo. App. 130, 40 P. 1066 ('95); Taughenbaugh v. Clark, 6 Colo. App. 235, 40 P. 153 ('95).

(160) 1 Mills' Ann. Stat., §2265.

(161) *Post*, §52.

(162) 3 Mills' Ann. Stat. (2d ed.), §2265f. See *post*, §52.

(163) Conger v. Weaver, 6 Cal. 548, 65 Am. Dec. 528 ('56); Nevada D. Co. v. Kidd, 37 Cal. 282 ('69); Hewitt v. Story [Cal.], 64 Fed. 510 ('94); Ophir Min. Co. v. Carpenter, 4 Nev. 534

were held in Nevada, not to be valid excuses for lack of diligence, (164) but the courts of Idaho and Colorado have held that a poor man may take more time to complete the work of construction and application to beneficial use than a man with ample means. (165) In Taughenbaugh v. Clark, Reed, P. J., said:

"Men of limited means, pioneers in a new territory, who have not only to 'grub' and clear land, but erect houses and provide means of living while making a home, should not be held to the same rule with those more favored and having abundant capital. As long as the settler in the desert does not abandon, but continues in good faith to prosecute his construction of a ditch and the application of water to his land as rapidly as his means will permit, he should be held to be within the limit of *'a reasonable time'*." (166)

In many of the states and territories where irrigation codes, modeled upon the Wyoming code, have been enacted, the time in which the work of construction and application of the water are to be completed and made, is fixed by statute, subject to limitation or extension by the state or hydraulic engineer. (167) These enactments have almost entirely removed the possibility for contentions as to whether or not a claimant has been diligent and applied the water within a reasonable time.

('69); Irwin v. Strait *et al.*, 18 Nev. 436, 4 P. 1215 ('84); Rodgers v. Pitt [Nev.], 89 Fed. 420 ('98); Columbia M. Co. v. Holter, 1 Mont. 296 ('71); Woolman v. Garringer, 1 Mont. 535 ('72); Arnold v. Passavant, 19 Mont. 575, 49 P. 400 ('97); Cruse v. McCauley [Mont.], 96 Fed. 369 ('99); Miles v. Butte City Elec. & P. Co., 32 Mont. 56, 79 P. 549 ('05); Highland D. Co. v. Mumford, 5 Colo. 325 ('80); Sieber v. Frink, 7 Colo. 148 ('83); Farmers' Highline C. & Res. Co. v. Southworth, 13 Colo. 111, 21 P. 1028 ('89); Colo. Land & W. Co. v. Rocky Ford C. R. L. L. & T. Co., 3 Colo. App. 546, 34 P. 580 ('93); Beaver Brook Res. & C. Co. v. St. Vrain Res. & Fish Co., 6 Colo. App. 130, 40 P. 1066 ('95); Taughenbaugh v. Clark, 6 Colo. App. 235, 40 P. 153 ('95); Clough v. Wing, 2 Ariz. 371, 17 P. 453 ('88); Conant v. Jones, 3 Ida. 606, 32 P. 250 ('93); Moss v. Rose, 27 Ore. 595, 41 P. 666 ('95); Moyer v. Preston, 6 Wyo. 308, 44 P. 845 ('96).

(164) Ophir Silver Min. Co. v. Carpenter, 4 Nev. 534 ('69).

(165) Conant v. Jones, 3 Ida. 606, 32 P. 250 ('93); Taughenbaugh v. Clark, 6 Colo. App. 235, 40 P. 153 ('95).

(166) Taughenbaugh v. Clark, 6 Colo. App. 235, 40 P. 153 ('95).

(167) *Post*, §53.

§ 52. Maps and Statements.

Prior to 1881 Colorado had no legislative provision providing or regulating the procedure for making an appropriation. (168) In that year it was provided by statute (169) that an appropriator who might thereafter construct or enlarge any diverting, carrying or storage works, of a carrying capacity of more than one cubic foot per second, should, within 90 days after the commencement of such construction or enlargement, file in the office of the county clerk and recorder of the county in which the headgate of such works might be situated, and also in the office of the state hydraulic engineer, (170) a map showing, among other things, the location of the headgate and the legal subdivisions of land upon which the structure is to be built, and upon or attached to the map should be a statement giving the location of the headgate, the depth, width and grade of the works, the carrying capacity and the time of the commencement of the work, which could be fixed at the time when the surveys were begun. Upon compliance with the act and filing the map and statement within the time specified, the priority dated from the day named as the day of commencing work, otherwise only from the date of the filing of same. In 1894 the supreme court held that in the absence of testimony tending to show that the ditch in question was of the character contemplated by the act, an objection to the validity of an appropriation on the ground of failure to file a map and statement, as required thereby, was untenable. (171) In the case of Beaver Brook Res. Co. v. St. Vrain Res. Co., (172) the court of appeals said:

"The only object of filing the declaratory statement, provided for by 1 Mills' Ann. Stat. §2265, is to give notice; but where one has actual notice by

(168) See *ante*, §44.
(169) 1 Mills' Ann. Stat., §2265, as amended by act '87.
(170) Colorado never had such an officer. Beaver Brook Res. Co. v. St. Vrain Res. Co., 6 Colo. App. 130, 40 P. 1066 ('95).
(171) Denver T. & Ft. W. R. Co. v. Dotson, 20 Colo. 304, 38 P. 322 ('94).
(172) 6 Colo. App. 130, 40 P. 1066 ('95).

observation of the premises, no claim of ignorance or surprise can be made and no record notice is necessary."

In Taughenbaugh v. Clark, (173) the court noted the fact that no map or statement had been filed, and held that as the point was not raised it would be taken as waived. In 1899 the act was declared unconstitutional because the subject-matter of the act was not expressed in the title. (174) The court in this case made no reference to the amendment of 1887, (175) leaving some question as to whether or not the act as amended was to be held void and unconstitutional. This question is fully discussed and annotated in the report of this case in Colorado Decisions (annotated). (176) Rights to the use of water which depend for their existence upon a compliance with the requirements of this act, (177) cannot be enforced as against superior rights notwithstanding the original appropriators of water relied upon the validity of the statute, and the rights of other appropriators of water in the same district have been adjudicated upon the assumption that the statute was valid. (178) Another so-called "map and statement statute" (179) was passed in 1903, (180) which requires that the map and statement shall show about the same things as were required by the former act. They must be filed, however, in duplicate within 60 days after the commencement of the work, in the office of the state engineer, who shall, if an examination shows that the data therein contained is sufficient and satisfactory for a clear presentation of the facts, file one of the maps and

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(173) 6 Colo. App. 235, 40 P. 153 ('95).
(174) Lamar Canal Co. v. Amity L. & Irr. Co., 26 Colo. 370, 58 P. 601 ('99). See, also, Rio Grande Land & Canal Co. v. Prairie Ditch Co., 27 Colo. 225, 60 P. 726 ('00).
(175) 1 Mills' Ann. Stat., §2265.
(176) 1 Colo. Dec. 205, note at p. 213.
(177) Act of 1881, 1 Mills' Ann. Stat., §2265.
(178) Great Plains Water Co. v. Lamar Canal Co., 31 Colo. 96, 71 P. 1119 ('03).
(179) Great Plains Water Co. v. Lamar C. Co., 31 Colo. 96, 71 P. 1119 ('03).
(180) 3 Mills' Ann. Stat. (2d ed.), §§2265*a*-2265*g*.

statements in his office, and return the other duly certified and approved to the claimant, who shall within 90 days from the commencement of the work file such certified copy with the clerk and recorder of the county in which the headgate of the diverting works is situated. A certified copy of such map and statement is made *prima facie* evidence of the intent of the claimant or claimants.

The act does not designate any time from which the priority shall be dated, nor does it give any power to the state engineer other than seeing that the map and statement shall contain a sufficient statement of the work proposed. It also fails to provide any penalty for a failure to make the required filings. The only substantial thing gained by the act is a good and sufficient record of the various diversion projects throughout the state, which give notice of the facts therein contained to subsequent appropriators. This act has not as yet been discussed nor considered by the supreme court of the state. In Oregon the appropriator, in addition to posting a notice, (181) is required to file a copy of such notice in the office of the county clerk and also in the office of the state engineer. With the latter officer he must also file maps, field notes, plans and specifications to show the method of construction. (182) In Texas the appropriator is required to file a map and statement within 90 days after the commencement of the work of construction, containing about the same information as is required in Colorado. Upon compliance with the statute, the date of priority relates back to the time when the work of excavation or construction was commenced. (183) A failure to file such statement does not, however, work a forfeiture of rights acquired theretofore, nor prevent the claimants of such rights from establishing them in the courts. (184) The affidavit of the president of an irrigation company attached to a map and statement, although it purports to have been made by him as

(181) *Ante*, §49.
(182) Sess. L. '05, p. 401; §1; *post*, ch. 44.
(183) Sayle's Civil Stat., arts. 3120, 3121.
(184) Sayle's Civil Stat., art. 3121.

an individual and not by the corporation through him, was presumed to have been made by the authority and at the instance of the corporation. (185)

§ 53. Statutory Permits — Irrigation Codes — Wyoming System.

Wyoming, upon being admitted to the Union in 1891, by constitutional and statutory provisions (186) enacted a system of laws relating to the appropriation of waters, that has been adopted with a few minor changes by Idaho, (187) Nebraska, (188) Nevada, (189) New Mexico, (190) North Dakota, (191) Oklahoma, (192) South Dakota, (193) and Utah. (194) Oregon, (195) in 1905, adopted an act containing a few of the features of the irrigation codes, and might be classed with those states following the recent movement for the adoption of a uniform irrigation law. The principal features of these codes, which may be called the Wyoming System, (196) with the exception of that adopted by Oregon are, that the primary control of the waters of the state is vested in a state or irrigation engineer, and a board of control; that a person desiring to appropriate any of the waters of the state must make an application (197) to such engineer, who is given power to issue or refuse a permit to the applicant. If a permit is issued, the engineer shall in the permit specify the time when the work must be completed and the time within which the water must be beneficially used.

(185) Bay City Irr. Co. v. Sweeney, — Tex. —, 81 S. W. 545 ('04).
(186) Const., arts. 1, 8; Rev. St. 1899, Sess. L. '01, '03, '05; *post*, ch. 49.
(187) Sess. L. '03, p. 224; Amd. Sess. L. '05, p. 357; *post*, ch. 36.
(188) Comp. Stat. '05, §§6400-6475; *post*, ch. 39.
(189) Sess. L. '03, p. 18; *post*, ch. 40.
(190) Sess. L. '05, p. 270; *post*, ch. 41.
(191) Rev. Code '05, §§7604-7685; *post*, ch. 42.
(192) Sess. L. '05, p. 275; *post*, ch. 43.
(193) Sess. L. '05, p. 201; *post*, ch. 45.
(194) Sess. L. '05, p. 145; *post*, ch. 47.
(195) Gen. L. '05, p. 401; *post*, ch. 44.
(196) For a brief comparison of the Wyoming and Colorado systems as to adjudicating priorities, see *post*, §146.
(197) For form of application, see *post*, Part X.

The adjudication of priorities is made by the board of control in some of these states,(198) and in the others by the courts in proceedings instituted by the attorney general.(199) In Utah the clerk of the district court begins the proceedings by notice to file claims.(200) If the engineer's records show that the waters of a stream are fully appropriated, he must refuse to issue a permit. In these states no valid appropriation can now be made without a permit from the engineer. Appeals may be taken from the decision of the engineer to the board, and from the board to the courts. It was contended in both Wyoming(201) and Nebraska(202) that the act was unconstitutional because it undertook to confer judicial power upon the board; but the appellate court in each state, in very lengthy and carefully considered opinions sustained the constitutionality of the act.

In perhaps all of the irrigation codes and statutes the principal features are administrative: providing for a proper enforcement of the appropriator's rights, for the policing of the waters, for a division of the state into districts for the purpose of administering the laws concerning waters, for the listing of all existing appropriations, and for a definite and comprehensive method of making subsequent appropriations.(203) In some of these states statutes providing for the creation of incorporated irrigation districts, modeled after the "Wright Act" of California, have been adopted.(204)

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(198) Wyoming, Rev. Stat. '99, §§851-887, *post*, ch. 49; Nebraska, Compiled Stat. '05, §6424, *post*, ch. 39; New Mexico, Sess. L. '05, p. 280, §§29-37, *post*, ch. 41.

(199) Oklahoma, Sess. L. '05, p. 276, §§5-6, *post*, ch. 43; North Dakota, Rev. Codes '05, §§7618-7619, *post*, ch. 42; South Dakota, Sess. L. '05, p. 204, §§15-16, *post*, ch. 45; Oregon, Gen. L. '05, p. 402, §3, *post*, ch. 44.

(200) Utah, Sess. L. '05, p. 148, §§11-25, *post*, ch. 47.

(201) Farm Inv. Co. v. Carpenter, 9 Wyo. 110, 61 P. 258 ('00).

(202) Crawford Co. v. Hathaway, 60 Neb. 754, 84 N. W. 271 ('00).

(203) For the relation between carrier and consumer, see *post*, §118.

(204) *Post*, §§98-103.

(*d*) *Priority.*

§ 54. Right of Priority Based on Principle—First in Time, First in Right.

As we have seen, the fundamental principle of the customs and decisions prior to the enactment of any statutes governing the appropriation of water was, "first in time, first in right." (205) This idea of priority in point of time giving priority in point of right, has been made the basic principle of the irrigation law in all the legislative enactments in the arid and semi-arid states and territories. (206) It becomes accordingly the basic principle also of the doctrine of appropriation.

This principle of priority applies to the amount of water necessary for the use for which it was intended, (207) and the right of priority has been held to be a property right subject to sale and transfer. (208)

§ 55. Priority and Riparian Rights.

In California and the other states following the "California System," (209) where riparian rights (210)

(205) *Supra*, §§8, 9.

(206) *Post*, statutes of states and territories, Part X; Coffin v. Left-Hand D. Co., 6 Colo. 443 ('82); Thomas v. Guiraud, 6 Colo. 530 ('83); Hammond v. Rose, 11 Colo. 524, 19 P. 466 ('88); Armstrong v. Larimer, etc., Co., 1 Colo. App. 49, 27 P. 235 ('91); Strickler v. City, 16 Colo. 61, 26 P. 313 ('91); Morgan Land & Canal Co. v. So. Platte D. Co., 18 Colo. 1, 30 P. 1032 ('92); Bloom v. West, 3 Colo. App. 212, 32 P. 846 ('93); U. S. Freehold Land & Em. Co. v. Gallegos, 1 Leg. Adv. 412 ('98); Colorado Mill & Elevator Co. v. Larimer and Weld Irr. Co., 26 Colo. 47, 56 P. 185 ('99); Cache La Poudre Res. Co. v. Water Sup. & Stor. Co., 27 Colo. 532, 62 P. 420 ('00); Chiatovich v. Davis, 17 Nev. 133, 28 P. 239 ('82); Reno Smelting Co. v. Stevenson, 20 Nev. 269, 21 P. 317 ('89); Union Mill Co. v. Dangberg [Nev.], 81 Fed. 73 ('97); Ennor v. Raine, 27 Nev. 178, 74 P. 1 ('03); Malad Val. Irr. Co. v. Campbell, 2 Ida. 378, 18 P. 52 ('88); Kirk v. Bartholomew, 2 Ida. 1087, 29 P. 40 ('92); Krall v. U. S. [Ida.], 79 Fed. 241 ('97); Dunniway v. Lawson, 6 Ida. 28, 51 P. 1032 ('98); Moyer v. Preston, 6 Wyo. 308, 44 P. 845 ('96); Hague v. Nephi Irr. Co., 16 Utah 421, 52 P. 765 ('98); Herman Irr. Co. v. Butterfield M. Co., 19 Utah 453, 57 P. 536 ('99); Millheiser v. Long, 10 N. M. 99, 61 P. 111 ('00); Albuquerque L. & Irr. Co. v. Guiterrez, 10 N. M. 177, 61 P. 357 ('00).

(207) *Post*, §58.

(208) *Post*, §129.

(209) *Supra*, §20.

(210) *Supra*, §16.

are recognized, the principle of priority was applied by the customs of the people and the decisions of the courts, to the prejudice of locations on riparian land. An appropriation of water made before any riparian rights vested by reason of the location of land bordering on the stream, was sustained even though made before the passage of the acts of congress of 1866 and 1870. (211)

In this group of states and territories, too, the application just mentioned of the principle of priority in time as between an appropriator of water and the locator of riparian land, is still adhered to by the courts. (212) It has also been held in these states that while the provisions of the constitutions, statutes or irrigation codes, dedicating the use of the water of all streams to the people of the state, subject to the right of appropriation, do not repeal nor supersede the principles of the common-law doctrine of riparian rights already vested and accrued,—still they do prevent the acquisition of such rights in the future and require the doctrine of prior appropriation to be applied in determining the rights to the waters flowing in the natural channels acquired by appropriators after the passage of such constitutional or statutory provisions. (213)

(211) U. S. Rev. Stat., §§2339-2340, *post*, §§168-169; Jennison v. Kirk [Cal.], 98 U. S. 460 ('78); Broder v. Natoma Water Co., [Cal.], 101 U. S. 275 ('79); San Luis Water Co. v. Estrada, 117 Cal. 168, 48 P. 1075 ('97); Hayden v. Long, 8 Ore. 244 ('80); Hindman v. Rizor, 21 Ore. 112, 27 P. 13 ('91); Ison v. Nelson M. Co. [Ore.], 47 Fed. 199 ('91); Jones v. Adams, 19 Nev. 78, 6 P. 442 ('85); Sturr v. Beck [Dak. Ter.], 10 Sup. Ct. 350, 133 U. S. 541 ('90); Krall v. U. S. [Ida.], 79 Fed. 241 ('97).

(212) Woolman v. Garringer, 1 Mont. 535 ('72); Murray v. Tingley, 20 Mont. 260, 50 P. 723 ('97); Nevada Ditch Co. v. Bennett, 30 Ore. 59, 45 P. 472 ('96); Smyth v. Neal, 31 Ore. 105, 49 P. 850 ('97); Brown v. Baker, 39 Ore. 66, 65 P. 799 ('01); Oregon Const. Co. v. Allen D. Co., 41 Ore. 209, 69 P. 455 ('02); McCall v. Porter, 42 Ore. 49, 70 P. 820 ('02); Barrett v. Metcalf, 12 Tex. Civ. App. 247, 33 S. W. 758 ('96); Benton v. Johncox, 17 Wash. 277, 49 P. 495 ('97); Lone Tree D. Co. v. Cyclone D. Co., 15 S. Dak. 519, 91 N. W. 352 ('02); Stenger v. Thorp, 17 S. Dak. 13, 94 N. W. 402 ('03); Meng v. Coffey, 67 Neb. 500, 93 N. W. 713 ('03); Farmers' Irr. Dist. v. Frank, — Neb. —, 100 N. W. 286 ('04); Clark v. Allaman, — Kan. —, 80 P. 571 ('05).

(213) Crawford Co. v. Hathaway, 60 Neb. 754, 84 N. W. 271 ('00). *Contra*, Lux v. Haggin, 69 Cal. 255, 10 P. 674, at p. 739 ('86).

§ 56. Relations in Which Priority Applies.

As we have seen, the priority of right to use water for beneficial purposes is acquired by priority of appropriation. (214) As between those using water for the same purpose priority of use gives the better right irrespective of the mode of diversion; and this rule is applicable to individual consumers, as between themselves, when they receive the water through the agency of an artificial stream or canal as well as when they receive the same direct from the natural stream. (215) Appropriators of water from the same stream, through the same ditch, may have different priorities of right to the use of the water based upon the time of the several appropriations. (216) This right of priority applies also to the appropriation of water for storage and reservoir purposes. (217) One who has obtained a priority right to the use of water for irrigation, cannot appropriate the water for storage in any greater quantity or at any other or different time than it could be appropriated for irrigation, as against another appropriator whose right is subsequent to the appropriation for irrigation but prior to that for storage. Such a change in effect would be a new appropriation, and would be subject to all the rights that had vested prior to the date of the change. (218)

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(214) *Supra*, §55; Wheeler v. Northern Colo. Irr. Co., 10 Colo. 582, 17 P. 487 ('87).

(215) Elliott, J., in Farmers' Highline C. Co. v. Southworth, 13 Colo. 111, at p. 130 *et seq.*, 21 P. 1028 ('89). In this case the three justices agreed in reversing the judgment of the court below on a question of pleading, but each justice filed an opinion assigning different reasons. Helm, J., at p. 120, took the position that priorities are only recognized among those taking water directly from the *natural* streams under the Colorado constitution. The only real point decided by the court was as to the sufficiency of the complaint. See, also, Taughenbaugh v. Clark, 6 Colo. App. 235, 40 P. 153 ('95).

(216) Taughenbaugh v. Clark, 6 Colo. App. 235, 40 P. 153 ('95); Farmers' Ind. Ditch Co. v. Agricultural Ditch Co., 22 Colo. 513, 45 P. 444 ('96). See, also, preceding note.

(217) Water Supply & Storage Co. v. Larimer and Weld Irr. Co., 24 Colo. 322, 51 P. 496 ('97); Cache La Poudre Res. Co. v. Windsor Res. & Canal Co., 25 Colo. 53, 52 P. 1104 ('98).

(218) Colo. Milling & Elevator Co. v. Larimer and Weld Irr. Co., 26 Colo. 47, 56 P. 185 ('99).

§ 57. Date of Priority.

Under the early rules and customs the date of the appropriation, which also was the date of the priority, was fixed by the time an application of the water was made to a beneficial use. This rule or custom soon changed so that the date of priority was fixed not by the time when the water was first beneficially applied but by the time when the work of construction was commenced; provided the work was diligently prosecuted and the water was beneficially applied within a reasonable time. (219)

In those states and territories following the Wyoming system of laws relating to appropriation, their several irrigation codes specifically fix the date of the priority by the issuance of a permit based upon an application. (220)

In those states where no notice is required, or before such posting and filing were required, (221) it has frequently been found impossible to ascertain from the available evidence the exact day when the work was actually commenced, or when the water was first beneficially applied to its intended use. Under such circumstances the trial court is justified in arbitrarily fixing an approximate day or date. (222)

§ 58. Extent of Priority—When, Where and How to Measure—Speculative Appropriations—Cubic Foot for 50 to 70 Acres—Irrigation Season.

By the "extent of priority" is meant the quantity of water which the appropriator is entitled to divert to his own use. This question has been passed upon many times by the courts in the arid and semi-arid states and territories, and is complicated by a consideration of what is called the "duty of water," treated in the next section.

As we have seen, a reasonable time has always

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(219) *Supra*, §§48-52. Where the water was beneficially used prior to the posting of the notice, the date was fixed by the beneficial use—Brown v. Newell, — Ida. —, 85 P. 385 ('06); see *post*, §64.

(220) *Supra*, §51. See, also, statutes, *post*, Part X.

(221) *Supra*, §§48-52.

(222) McDonald v. Lannen, 19 Mont. 78, 47 P. 648 ('97).

been allowed by rule, custom or statute, in which to put the water to a beneficial use. The arid West was originally wild, stony, unbroken and unimproved land, and it was practically impossible for the average settler to make necessary improvements and to clear it of stones or brush, and to break, irrigate and cultivate any considerable acreage during the first few years. Therefore, in determining the extent of the appropriation for irrigation, it became necessary in many cases to determine when—that is, at what particular time or date—the measurement of the appropriation for irrigation should be made. This determination depended, of course, upon the intention (223) of the appropriator as to the ultimate extent of his appropriation, also the area and character of the irrigable land that he owned, the size and capacity of his diverting works, and the time which he had already consumed in putting the water to a beneficial use. (224) The great weight of modern authority is to the effect that when an appropriator permits part of the water appropriated to run to waste, or fails to use a certain portion of it for some beneficial use or purpose, he can only hold that part of the water which has been actually applied to a beneficial use, and his right is limited to the quantity so used. (225) The mere fact that the appropriators had secured control of all the water through a so-called "saving

(223) "Such intention, unless established by notice, or in some other public manner, could in no way be known to or control others wishing to take water from the same stream, and such intention could only be inferred or deduced, *first*, from the capacity of the ditch at its head. and perhaps, *second*, the amount of irrigable land of the ditch proprietors upon which it could reasonably be supposed that they intended to apply it." Reed, J., in Taughenbaugh v. Clark, 6 Colo. App. 235, at p. 242, 40 P. 153 ('95).

(224) U. S. Freehold Land & E. Co. v. Gallegos [Colo.], 2 Leg. Adv. 256, 89 Fed. 769 ('89); Nichols v. McIntosh, 19 Colo. 22, 34 P. 278 ('93); Hindman v. Rizor, 21 Ore. 112, 27 P. 13 ('91); Kleinschmidt v. Greiser, 14 Mont. 484, 37 P. 5 ('94); Rodgers v. Pitt [Nev.], 89 Fed. 420 ('98), 129 Fed. 932 ('04); Eliot v. Whitmore, 23 Utah 342, 65 P. 70 ('01).

(225) Becker v. Marble Cr. Irr. Co., 15 Utah 225, 49 P. 892 ('97); see, also, Hague v. Nephi Irr. Co., 16 Utah 421, 52 P. 765 ('98); Sieber v. Frink, 7 Colo. 148, 2 P. 901 ('83); Combs v. Agricultural D. Co., 17 Colo. 146, 28 P. 966 ('92); Hewitt v. Story [Cal.], 64 Fed. 510 ('94).

ditch," would not give them the absolute right to deprive a subsequent appropriator of such quantity as they did not put to a beneficial use. (226) The priority of the ditch is measured at the point of diversion from the natural stream. (227) There has been some difference of opinion as to the method of measuring the priority, some courts holding that it is measured by the capacity of the ditch or flume at its smallest point, (228) but the greater weight of authority is in favor of measuring the appropriation by the amount of water actually applied to a beneficial use, within a reasonable time. (229) The decisions in Colorado show the evolution of the rule now applied in measuring the extent of a priority. The first rule of decision was, that the "first appropriator has a prior right to such water to the extent of his appro-

(226) Becker v. Marble Cr. Irr. Co., 15 Utah 225, 49 P. 892 ('97), citing Ft. Morgan Land & C. Co. v. South Platte Ditch Co., 18 Colo. 1, 30 P. 1032 ('92); Farmers' Highline Canal & Res. Co. v. Southworth, 13 Colo. 111, 21 P. 1028 ('89).

(227) Kleinschmidt v. Greiser, 14 Mont. 484, 37 P. 5 ('94); Stickney v. Hanrahan, 2 Ida. 434, 63 P. 189 ('00).

(228) Carûthers v. Pemberton, 1 Mont. 111 ('69); Sayre v. Johnson, — Mont. —, 81 P. 389 ('05); Ophir Silver Min. Co. v. Carpenter, 6 Nev. 393 ('73); Coventon v. Seufert, 23 Ore. 548, 32 P. 508 ('93); Browning v. Lewis, 39 Ore. 11, 64 P. 304 ('01).

(229) White v. Todd's Co., 8 Cal. 443 ('57); Dougherty v. Haggin, 61 Cal. 305 ('82); Barrows v. Fox, 98 Cal. 63, 32 P. 811 ('93); Hewitt v. Story [Cal.], 64 Fed. 510 ('94); Riverside Co. v. Sargent, 112 Cal. 230, 44 P. 560 ('96); Santa Paula Water W. Co. v. Peralta, 113 Cal. 38, 45 P. 168 ('96); Senior v. Anderson, 115 Cal. 496, 47 P. 454 ('96); Smith v. Hawkins, 120 Cal. 86, 52 P. 139 ('98); Senior v. Anderson, 130 Cal. 290, 62 P. 563 ('00); Bledsoe v. Decrow, 132 Cal. 312, 64 P. 397 ('01); Strong v. Baldwin, 137 Cal. 432, 70 P. 288 ('02); Simpson v. Williams, 18 Nev. 432, 4 P. 1213 ('84); Roeder v. Stein, 23 Nev. 92, 42 P. 867 ('95); Union Mill Co. v. Dangberg [Nev.], 81 Fed. 73 ('97); Rodgers v. Pitt [Nev.], 89 Fed. 420 ('98); 129 Fed. 932 ('04); Gotelli v. Cardelli, 26 Nev. 382, 69 P. 8 ('02); Drake v. Earhart, 2 Ida. 716, 23 P. 541 ('90); Stickney v. Hanrahan, 7 Ida. 424, 63 P. 189 ('00); Quigley v. Birdseye, 11 Mont. 439, 28 P. 741 ('92); Kleinschmidt v. Greiser, 14 Mont. 484, 37 P. 5 ('94); Creek v. Bozeman W. Co., 15 Mont. 121, 38 P. 459 ('94); Anderson v. Cook, 25 Mont. 330, 64 P. 873 ('01); Becker v. Marble Cr. Irr. Co., 15 Utah 225, 49 P. 892 ('97); Hague v. Nephi Irr. Co., 16 Utah 421, 52 P. 765 ('98); Nephi Irr. Co. v. Vickers, 29 Utah 315, 81 P. 144 ('05); Bowman v. Bowman, 35 Ore. 279, 57 P. 546 ('99); Cole v. Logan, 24 Ore. 304, 33 P. 568 ('93); Glaze v. Frost, 44 Ore. 29, 74 P. 336 ('03); Bolter v. Garrett, 44 Ore. 304, 75 P. 142 ('04).

priation." (230) This rule, as it was interpreted, led to many excessive appropriations, and was more or less superseded by the second rule, "that the priority of right is limited to the amount of water actually appropriated and to the amount actually needed," (231) which perhaps is not less indefinite than the first. The last rule, and one which can be applied to every appropriation, is that an appropriator should not be entitled to divert more water than with economy he can beneficially use for the purposes for which the appropriation is made. (232) The inexperience of irrigators, as well as of legislators and of the courts, also the fraud and daring of unscrupulous appropriators during the infancy of the doctrine of appropriation, led to many very excessive appropriations, which when adjudicated by the courts were officially recognized, and confirmed by decree. The policy of the law against wasteful, excessive and speculative appropriations has, in recent years, been more rigidly enforced. and it has had the effect of reducing the amount of water appropriated for irrigation purposes, by individuals or corporations.

In those states and territories adopting statutes or codes modeled after the Wyoming statute, the amount of the priority and appropriation for irrigation purposes is fixed by statute, varying in amount from one cubic foot per second for fifty acres, to one cubic foot for seventy acres. (233) This limitation, placed upon the maximum appropriation, has given rise to the question as to whether the water is to be measured at the place of use or at the point of diversion from the stream. Appropriators claim that if measured at the point of diversion, the losses in the

(230) Schilling v. Rominger, 4 Colo. 100 ('78); Coffin v. Left-Hand D. Co., 6 Colo. 445 ('82); Thomas v. Guiraud, 6 Colo. 530 ('83).

(231) Nichols v. McIntosh, 19 Colo. 22, 34 P. 278 ('93).

(232) New Mercer D. Co. v. Armstrong, 21 Colo. 357, 40 P. 989 ('95); Church v. Stillwell, 12 Colo. App. 43, 54 P. 395 ('98); U. S. Freehold Land & Em. Co. v. Gallegos [Colo.], 2 Leg. Adv. 586, 89 Fed. 769 ('98).

(233) *Post*, statutes of Wyoming, ch. 49; Idaho, §961; Nebraska, §1337; Oklahoma, ch. 43; New Mexico, ch. 41; North Dakota, ch. 42; South Dakota, ch. 45; Utah, ch. 47. See, also, Farm Inv. Co. v. Carpenter, 9 Wyo. 110, 87 Am. St. 918, 61 P. 745 ('00).

canal will be so great that the amount delivered will be inadequate for their needs. Water commissioners claim that it will be practically impossible to measure each appropriation at the head of the user's lateral.

In one instance no water is drawn from a canal for a distance of 11 miles below its head. Measurements were made to determine the loss in this distance and it was found to vary from 18 to 36 per cent. It was urged that this loss was so great that the amount turned into the canal should be increased enough to compensate therefor, but the state authorities refused to recognize this claim on the ground that such a concession would put an end to the improvement of ditches, since the greater the loss the larger the appropriation which would be secured, and that its practical effect would be to place a premium on poor construction and wasteful operating of canals. (234)

The unit of measurement for the flow of water has been established by statute in most of the states and territories as the cubic foot per second of time, (235) and the unit of volume as the acre-foot. (236) The miner's inch is also frequently employed as a unit of measurement. But this phase of the subject is more specifically treated in the chapter on the measurement of water. (237) The extent of an appropriation for irrigation purposes should also be measured by the length of the irrigating season, or in other words, the period during which a beneficial use of the water for that purpose can be made. No definite period has been established by statute, although the Colorado act requires ditch companies engaged in carrying water to keep a flow of water in the ditch or canal from April 1 to November 1 of each year, when demanded by the users. (238) In Twaddle v. Winters (239) the supreme court of Nevada announced that the decree should have

(234) Bulletin No. 86, Dept. Agriculture, p. 39.
(235) See *post*, §90.
(236) *Post*, §90.
(237) *Post*, §90.
(238) 3 Mills' Ann. Stat. (2d ed.), §2287.
(239) — Nev. —, 85 P. 280 ('06).

limited the appropriator to not later than October first of each year for the use of the water, because the evidence showed that it was not needed thereafter. The United States circuit court for the northern district of California, in the case of Anderson v. Bassman, (240) recognized an irrigation season extending from June to October, inclusive.

§ 59. Duty of Water for Irrigation as Affecting Extent of Priority.

In determining the amount of water necessary for the irrigation of the lands of an appropriator, it is necessary to consider the character of the soil, the distance from the stream (so as to make due allowance for seepage and evaporation), the number of acres irrigated, and such other facts as may assist in the premises.

The United States government has for many years been making experiments and collecting statistics relating to irrigation, and particularly the duty of water. (241) In making the measurements necessary in these investigations, the "acre-foot" (242) is used. The measurements and observations show that the duty varies from less than one acre-foot of water per acre to more than 15 acre-feet. These wide variations are explained by imperfect ditch or canal construction, careless and wasteful handling of the water, as well as the different classes of soils upon which the water was applied. A comparison of the measurements made on eight small well-built ditches, in eight states and territories, showed the highest duty to be 1.82 acre-feet per acre, and the lowest 2.82 acre-feet, an average of 2.37 acre-

(240) 140 Fed. 14, 29 ('05).

(241) An article on the duty of water, based on the government reports and statistics, is published in the report of the state board of irrigation of Nebraska, 1901-02, p. 186. The state engineer of Utah, in his biennial report for 1903-04, at p. 72, gives the result of measurements made during one season of the water used upon 36.72 acres, divided into small plats averaging about seven acres each, and obtained the following statistics as to the duty of water on the various crops: Wheat, 4.03 acre-feet; oats, 4.95 acre-feet; timothy, 11.71 acre-feet; potatoes, 4.61 acre-feet; and alfalfa, 3.44 acre-feet.

(242) *Post*, §90, measurement of water.

feet. (243) A comparison of five measurements made at the margin of the field shows the highest duty to be .70 of an acre-foot per acre, and the lowest 1.78 acre-feet, an average of 1.34 acre-feet per acre. (244) A comparison of the foregoing with the measurements taken at the headgates of the ditches or canals, and in which the losses in the main canal are included, shows a most surprising loss by seepage and evaporation in carrying the water from the stream to the place of use. Measurements made at the heads of seven canals in five states and territories, show the highest duty of water when the losses in the main canal are included, to be 3.81 acre-feet, and the lowest 6.61 acre-feet, an average of 5.47 acre-feet per acre. (245) These statistics show that more than twice as many acre-feet were required where the water was measured at the headgate as where measured at the place of use.

The investigations also include the requirements of different crops, and, for instance, have shown that corn needs less water than alfalfa, as is the case also with orchards, but many irrigators have been found who use far more water on their corn and orchard than is given their crop of alfalfa, and this is designated as a wasteful use. (246)

It is well known that soil varies in character, from the adobe or clay formation to the sandy loams. On the former, with a subsoil of clay, the duty of water is much higher than on the latter, with its porous and absorbing formation. If the priority is measured at the point of diversion from the stream, (247) all these features should be considered in order that the highest duty of water may be obtained with the lowest possible waste. Some states and territories have within recent years fixed a minimum duty of water by statute, (248) but the majority

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(243). Bulletin 86, Dept. Agriculture, p. 34.
(244) *Id.*, p. 35.
(245) Bulletin 86, Dept. Agriculture, p. 35.
(246) Bulletin 86, Dept. Agriculture, p. 41.
(247) *Ante*, §58.
(248) *Ante*, §58. See report of state engineer of South Dakota, 1906, p. 60.

leave this question to be determined from the facts and circumstances of each separate case. (249)

§ 60. Enjoyment of Priority.

A prior appropriator does not acquire any title to, nor ownership of, the waters running in the natural channel of the stream; he does acquire, however, a right to the use of the water to the extent of his needs. He has no control over the surplus, and this may be appropriated by subsequent appropriators. (250) The right he does have naturally carries with it an interest in the stream from his point of diversion to its source, and he is entitled to the natural flow of the stream to the extent of his priority undeteriorated in quality and undiminished in quantity, and it makes no difference whether the source of the stream is a spring, a pond or a lake. (251) Subsequent appropriators cannot interfere with the flow of the water, nor divert it from the natural channel to his prejudice. (252) He, however, has no such right as will entitle him to interfere with a proper use and enjoyment of the surplus water by subsequent appropriators,—and when he has no use for the water appropriated by him, he cannot sell, withhold, or otherwise dispose of it, but must permit it to remain in the natural channel for the use of other appropriators in the order of their priority. (253) His situation is aptly expressed by Hawley, U. S. District Judge for the district

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(249) *Ante*, §58.

(250) *Supra*, §37; Beaver Lead Canal Co. v. Dillon Elec. L. & P. Co., — Mont. —, 85 P. 880 ('06).

(251) Coffin v. Left-Hand D. Co., 6 Colo. 443 ('82); Larimer Co. Res. Co. v. People, 8 Colo. 614, 9 P. 794 ('85); Cushman v. Highland D. Co., 3 Colo. App. 437, 33 P. 344 ('93); Quigley v. Birdseye, 11 Mont. 439, 28 P. 741 ('92); Union Mill Co. v. Dangberg [Nev.], 81 Fed. 73 ('97); Manning v. Fife, 17 Utah 232, 54 P. 111 ('98); Salt Lake City v. Salt Lake City Water & E. Power Co., 24 Utah 249, 67 P. 672 ('03); Cole v. Richards Irr. Co., 27 Utah 205, 75 P. 376 ('04).

(252) Cases cited in note 251, *supra*. Montana Co. v. Gehring [Mont.], 75 Fed. 384 ('96).

(253) Quigley v. Birdseye, 11 Mont. 439, 28 P. 741 ('92); Creek v. Bozeman, 15 Mont. 121, 38 P. 459 ('94); Union Mill Co. v. Dangberg [Nev.], 81 Fed. 73 ('97); Manning v. Fife, 17 Utah 232, 54 P. 111 ('98).

of Nevada, who says: "There cannot be any dog-in-the-manger business." (254)

It has been held that a subsequent appropriator may divert the water from the natural channel, and instead of returning it to the stream after using, he may convey it into the prior appropriator's ditch below the headgate and above his place of use; provided, the water is undeteriorated in quality, and undiminished in quantity below the extent of the prior appropriator's rights. (255) The prior appropriator cannot change his use, (256) nor sell the right to another for a different use, if such a change would in any way interfere with or injure a subsequent appropriator, (257) nor can he enlarge his rights to the detriment of the latter by increasing his demands, or by extending his use to other lands, even if used for a beneficial purpose. (258)

Each is entitled to the flow of the stream as it was at the time of his appropriation to the extent of his priority, and if any one is to suffer inconvenience or deprivation, the first appropriator must suffer last. (259) An appropriator cannot waste the water taken into his ditch by seepage caused by defective maintenance, to the detriment of subsequent appropriators, who, if the water were economically carried and used, could be supplied with water for their several needs. (260)

§ 61. Priority in Relation to Other or After-acquired Lands—Loaning Water.

We have seen the extent of the appropriator's right, and the manner in which it can be enjoyed.

(254) Union Mill Co. v. Dangberg [Nev.], 81 Fed. 73 ('97).
(255) Austin v. Chandler, — Ariz. —, 42 P. 483 ('95).
(256) *Supra*, §47.
(257) Creek v. Bozeman W. Co., 15 Mont. 121, 38 P. 459 ('94); *supra*, §47.
(258) Becker v. Marble Cr. Irr. Co., 15 Utah 225, 49 P. 892 ('97). See, also, Lobdell v. Simpson, 2 Nev. 274 ('66); Nevada Water Co. v. Powell, 34 Cal. 109 ('67); Gould "On Waters," §231; Salina Cr. Irr. Co. v. Salina Stock Co., 7 Utah 456, 27 P. 578 ('91).
(259) Farmers & Merch. Irr. Co. v. Cozad Irr. Co., 65 Neb. 3, 90 N. W. 951 ('02).
(260) Court House Rock Irr. Co. v. Willard, — Neb. —, 106 N. W. 463 ('06).

It now becomes important to ascertain whether or not he can continue using the water for the originally intended use, and when not needed for that particular purpose, apply it to another use (in irrigation, to other or after-acquired lands).

The extent of the priority is limited to the use intended at the time the original appropriation was made, provided the application to the use is made within a reasonable time. (261) The surplus water in the stream over and above that which is necessary for such intended use, is subject to appropriation by others, and the latter acquire a right to such surplus, subject only to the prior appropriation for a particular purpose. It would, therefore, be manifestly to the injury of the subsequent appropriator to permit a person holding a prior right, to enlarge his use of the water by applying it not only to the use for which it was intended, but to other uses, or different lands: for when not needed by him for its original use, it rightfully belongs to the subsequent appropriators in the order of their priority.

The rights of the appropriator are fixed by the use intended at the time when he makes his appropriation, and he cannot enlarge his rights to the detriment of subsequent appropriators by increasing his demands, or by extending his use to other lands, even if used for a beneficial purpose. (262) A priority of right to the use of water for irrigation may be limited by time as well as quantity. Where water has been appropriated for the purpose of irrigating land, it must be so applied without waste, and when not needed for the purpose for which it was appropriated, should be turned back into the stream to be utilized by other appropriators, according to their respective numerical priorities. So long as it is used in connection with a certain tract of land, it cannot be made to do duty to that particular tract, and in the same season when no longer needed therefor, be applied

(261) *Supra*, §58.

(262) Becker v. Marble Cr. Irr. Co., 15 Utah 255, 49 P. 892, 1119 ('97). See, also, Lobdell v. Simpson, 2 Nev. 274 ('66); Nevada Water Co. v. Powell, 34 Cal. 109 ('67); Salina Cr. Irr. Co. v. Salina Stock Co., 7 Utah 456, 27 P. 578 ('91).

to some other particular tract of the owner, or by him exchanged or loaned to some other person, to the injury of the rights of other appropriators. It would seem, however, that where other rights are not injured, an exchange or loan of water might be made, at least in Colorado, but probably not in Arizona. (263)

(*e*) *Preference in Use.*

§ 62. Domestic Use.

By constitutional provision in Colorado, domestic use is first supplied in times of scarcity. (264) This preference is generally recognized and provided for in the irrigation statutes and codes of the arid states. (265) Colorado enforces this preference by a statutory provision that if water appropriated for domestic use is used for irrigation, it is a misdemeanor. (266)

In construing the constitutional provisions, the Colorado court of appeals held that such provisions do not authorize an interference with the rights of prior appropriators for irrigating purposes, whose rights vested before the adoption of the constitution, in order to supply later comers with water for domestic uses. (267) Later the supreme court of that state held that while Art. 16, § 6, of the constitution recognizes a preference in favor of those using water for domestic purposes over those using it for any other purpose, it was not intended thereby to authorize a diversion of water for domestic use from the public streams by means of large canals; that the use protected by the constitution is such use as the riparian owner has at common law to take water for himself, his family or his stock; and that if the term "domestic use" is to be given a greater or different mean-

(263) Ft. Lyon Canal Co. v. Chew, 33 Colo. 392, 81 P. 37 ('05); see, also, Union Mill Co. v. Dangberg [Nev.], 81 Fed. 73 ('97); Slosser v. Salt Riv. Canal Co., 7 Ariz. 376, 65 P. 332, 337, 339 ('01). See, also, 3 Mills' Ann. Stat. (2d ed.), §§2271*a-e*, *post*, ch. 35.
(264) Colo. Const. Art. 16, §6.
(265) See statutes, *post*, Part X.
(266) 3 Mills' Ann. Stat. (2d ed.), §2269*a*.
(267) Armstrong v. Larimer Co. Ditch Co., 1 Colo. App. 49, 27 P. 235 ('91).

ing than this, then as between such enlarged use and prior rights for agricultural and manufacturing purposes, it is subject to the constitutional provision requiring just compensation to those whose rights are affected thereby. (268) The business of making electric lights and power for the same is a sort of manufacture and is not classed as a domestic use. (269) Domestic use, under the common-law doctrine of riparian rights, is discussed in Part I. (270)

CHAPTER 7.

ABANDONMENT, FORFEITURE AND RESUMPTION.

(*a*) *Abandonment.*

§ 63. Abandonment—Defined.

At common law abandonment is defined as "the relinquishment of a claim or privilege." (271)

The right secured by the appropriator is, in law, a grant from the state or territorial government. (272) The right, therefore, can be lost in all of the arid and semi-arid states and territories by surrender or abandonment. (273) There is a great diversity of opinion as to what acts are sufficient to prove an intention to abandon. Abandonment is purely a matter of intention. (274) Neither non-use nor neglect of repairs is sufficient to create the presumption of abandonment un-

(268) Montrose Canal Co. v. Loutsenhizer Ditch Co., 23 Colo. 233, 48 P. 532 ('96).
(269) Schwab v. Beam [Colo.], 86 Fed. 41 ('98).
(270) *Supra*, §17.
(271) Webster's Dict.
(272) *Ante*, §40.
(273) The statutes of the different states and territories frequently have provisions relating to abandonment or forfeiture. See *post*, Part X.
(274) Hoffman v. Stone, 7 Cal. 47 ('57); Butte Canal & Ditch Co. v. Vaughn, 11 Cal. 143 ('58); Davis v. Gale, 32 Cal. 27 ('67); Utt v. Frey, 106 Cal. 397, 39 P. 807 ('95); Integral Quicksilver M. Co. v. Altoona M. Co. [Cal.], 75 Fed. 380 ('96). Atchison v. Peterson, 1 Mont. 561 ('72); Barkley v. Tieleke, 2 Mont. 61 ('74); Kleinschmidt v. Greiser, 14 Mont. 484, 37 P. 5 ('94); Middle Cr. D. Co. v. Henry, 15 Mont. 558, 39 P. 1054 ('95);

less continued for an unreasonable length of time.(275) In most cases it is held that such non-use must continue for the period prescribed by the statute of limitations. (276) An abandonment can be made by one or more tenants in common, and the others may, at the ame time, preserve their rights.(277) An appropriator using water through two or more ditches may abandon one ditch without abandoning the water right, (278)

Smith v. Hope, M. Co. 18 Mont. 432, 45 P. 632 ('96); Goon v. Procter, 27 Mont. 526, 71 P. 1003 ('03); Hayes v. Buzzard, 31 Mont. 74, 77 P. 423 ('04); Hewitt v. Story [Cal.], 64 Fed. 510 ('94); Moss v. Rose, 27 Ore. 595, 41 P. 666 ('95); Wimer v. Simmons, 27 Ore. 1, 39 P. 6 ('95); Greer v. Heiser, 16 Colo. 306, 26 P. 77 ('91); Beaver Brook Res. Co. v. St. Vrain Res. Co., 6 Colo. App. 130, 40 P. 1066 ('95); New Mercer D. Co. v. Armstrong, 21 Colo. 357, 40 P. 989 ('95); Putnam v. Curtis, 7 Colo. App. 437, 43 P. 1056 ('96); Nichols v. Lantz, 9 Colo. App. 1, 47 P. 70 ('96); Hall v. Lincoln, 10 Colo. App. 360, 50 P. 1047 ('97); North Am. Exploration Co. v. Adams [Colo.], 104 Fed. 404 ('00); Lower Latham D. Co. v. Louden Irr. Co., 27 Colo. 267, 60 P. 629 ('00); Hector M. Co. v. Valley View M. Co., 28 Colo. 315, 64 P. 205 ('01); Butterfield v. O'Neill, 19 Colo. App. 7, 72 P. 807 ('03); Shaltz v. Sweeney, 19 Nev. 359, 11 P. 253 ('86); Stallin v. Ferrin, 7 Utah 477, 27 P. 686 ('91); Holman v. Pleasant Grove, 8 Utah 78, 30 P. 72 ('92); Promontory Ranch Co. v. Argile, 28 Utah 398, 79 P. 47 ('04); Last Chance M. Co. v. Bunker Hill M. Co. [Ida.], 49 Fed. 430 ('92); Welch v. Garrett, 5 Ida. 639, 51 P. 405 ('97); Ada Co. Farmers' Irr. Co. v. Farmers' Canal Co., 5 Ida. 793, 51 P. 990 ('97); Farmers' Irr. Dist. v. Frank, — Neb. —, 100 N. W. 286 ('04). Abandonment being a matter of intention, it is proper to admit evidence of statements made by an appropriator which show no intention to abandon—Central Trust Co. v. Culver, — Colo. —, 83 P. 1064 ('05); Boulder & White Rock D. Co. v. Leggett Consol. D. & R. Co., — Colo. —, 86 P. 101 ('06).

(275) Cases cited, note 274.

(276) McCauley v. McKeig, 8 Mont. 389, 21 P. 22 ('89); Gassert v. Jones, 18 Mont. 216, 44 P. 959 ('96); Sloan v. Glancy, 19 Mont. 70, 47 P. 334 ('97); Dodge v. Martin, 7 Ore. 456 ('79); Ison v. Nelson [Ore.], 47 Fed. 199 ('91); Wimer v. Simmons, 27 Ore. 1, 39 P. 6 ('95); Turner v. Cole, 31 Ore. 154, 49 P. 971 ('97); Oviatt v. Big Four M. Co., 39 Ore. 118, 65 P. 811 ('01); Sieber v. Frink, 7 Colo. 148, 2 P. 901 ('83); Dorr v. Hammond, 7 Colo. 79, 1 P. 693 ('85); Farmers' Highline C. & Res. Co. v. Southworth, 13 Colo. 111, 21 P. 1028 ('89); People v. Farmers' Highline C. & Res. Co., 25 Colo. 202, 54 P. 626 ('98); North Am. Exploration Co. v. Adams [Colo.], 104 Fed. 404 ('00); Farmers' Irr. Dist. v. Frank, — Neb. —, 100 N. W. 286 ('04).

(277) Meagher v. Hardenbrook, 11 Mont. 385, 28 P. 451 ('91).

(278) *Post*, §129.

where the water is still diverted through the remaining ditch. (279) An abandonment of the right to use water is a relinquishment which operates for the benefit of other appropriators in the order of their priority, (280) and it cannot be made in favor of a particular individual or for a consideration, (280) and if for any reason the sale or conveyance of a right fails, it cannot be converted into an abandonment. (280) There can be no abandonment without some action of the will and an intent to abandon. Time is not an essential element of abandonment. The moment the intention to abandon and the relinquishment of possession unite, the abandonment is complete. (281) In the case of Schwab v. Beam, (282) where it was held that in Colorado the location of a placer *ex vi termini*, imports an appropriation of the waters covered by it so far as the waters are necessary for the working of the placer claim,—there can be no abandonment of the water as distinguished from the land, or of the land as distinguished from the water. (283) Water, which after being used by the appropriator, is turned into a natural stream without any intention of recapturing it, is abandoned, and is subject to appropriation and use by others. (284) Any intention to recapture such water must be clear and apparent. (285) Abandonment is most usually proved by a failure to use the water, or to keep the diverting works in repair, and if continued for an unreasonable period they create a presumption of an intention to abandon. This presumption, how-

(279) Nichols v. McIntosh, 19 Colo. 22, 34 P. 378 ('93); New Mercer D. Co. v. Armstrong, 21 Colo. 357, 40 P. 989 ('95).

(280) Middle Cr. D. Co. v. Henry, 15 Mont. 558, 39 P. 1054 ('95); Cache La Poudre Res. Co. v. Water Sup. & Storage Co., 27 Colo. 532, 62 P. 420 ('00); Last Chance Min. Co. v. Bunker Hill & S. Min. and Concentrating Co. [Ida.], 49 Fed. 430 ('92).

(281) Wimer v. Simmons, 27 Ore. 1, 39 P. 6 ('95); Nichols v. Lantz, 9 Colo. App. 1, 47 P. 70 ('96).

(282) 86 Fed. 41 ('98); Rutherford v. Lucerne Canal & Power Co., 12 Wyo. 299, 75 P. 445 ('04).

(283) For criticism of the Schwab-Beam case, see *supra*, §23.

(284) Colo. Land & Water Co. v. Rocky Ford Canal, etc., Co., 3 Colo. App. 545, 34 P. 580 ('93).

(285) Shaltz v. Sweeney, 19 Nev. 359, 11 P. 253 ('86).

ever, is not conclusive, and may be overcome by other satisfactory proofs, (286) and the burden of proving an abandonment is upon the party asserting it, (287) and it must be proven by a preponderance of the evidence. (288)

§ 64. Abandonment—Who Benefits By.

An abandonment operates for the benefit of the other appropriators from the same source, in the order of their priority. (289) The language used by Bissell, J., in Suffolk Gold Min. & Mill. Co. v. San Miguel Con. Min. & Mill. Co., (290) is somewhat misleading if the accepted meaning of the words, "subsequent locator" (291) is not kept in mind. Speaking of the effect of an abandonment, Bissell, J., said:

"Yet no one would dispute the proposition that if the appropriator abandons the use, whether it be the original or any subsequent one, he would thereby

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(286) Sieber v. Frink, 7 Colo. 148, 2 P. 901 ('83); Beaver Brook Res. Co. v. St. Vrain Res. Co., 6 Colo. App. 130, 40 P. 1066 ('95).

(287) Putnam v. Curtis, 7 Colo. App. 437, 43 P. 1056 ('96).

(288) Hall v. Lincoln, 10 Colo. App. 360, 50 P. 1047 ('97). Instances where there was held to have been an abandonment—Oppenlander v. Left-Hand Ditch Co., 18 Colo. 142, 31 P. 854 ('92); Lamborn v. Bell, 18 Colo. 346, 32 P. 989 ('93); Rutherford v. Lucerne Canal & P. Co., 12 Wyo. 299, 75 P. 445 ('04). Instances where it was held there had been no abandonment—Atchison v. Peterson, 1 Mont. 561 ('72); Middle Cr. Ditch Co. v. Henry, 15 Mont. 558, 39 P. 1054 ('95); Hayes v. Buzzard, 31 Mont. 225, 77 P. 423 ('04); Greer v. Heiser, 16 Colo. 306, 26 P. 770 ('91); Putnam v. Curtis, 7 Colo. App. 437, 43 P. 1056 ('96); Cache La Poudre Res. Co. v. Larimer and Weld Res. Co., 25 Colo. 144, 53 P. 318 ('98); Turner v. Cole, 31 Ore. 154, 49 P. 971 ('97); Welch v. Garrett, 5 Ida. 639, 51 P. 405 ('97).

(289) Middle Cr. D. Co. v. Henry, 15 Mont. 558, 39 P. 1054 ('95); Cache La Poudre Res. Co. v. Water Sup. & Storage Co., 27 Colo. 532, 62 P. 420 ('00); Last Chance Min. Co. v. Bunker Hill & S. Min. and Concentrating Co. [Ida.], 49 Fed. 430 ('92).

(290) 9 Colo. App. 407, at p. 412, 48 P. 828 ('97).

(291) "Subsequent locator" and "subsequent appropriator" are terms used to designate the person or persons who locate lands, or make an appropriation of water, after a location or appropriation has been made by another or others. Relatively speaking, the latter class is referred to as prior appropriators and the former as subsequent appropriators. The comparison is always made as between the dates of the respective appropriations. See cases cited under appropriations, §§39-40.

lose all title, and the right to the water would *revert to the people,* and *would belong to whomsoever might thereafter appropriate it, and would likewise inure to the benefit of any subsequent locator on the stream,* (292) who, by reason of the abandonment, might become both prior in time and prior in right."

It has been contended by some that the court there holds that after the abandonment, and the reversion of the water to the people, a new appropriation could be made and the new appropriator would, by virtue of his appropriation of an abandoned right, be advanced to the priority occupied by such right before the abandonment. This is clearly not the intention, for by the use of the clause "*would* likewise inure to the benefit of any subsequent locator on the stream," etc., the court clearly referred to those whose date of location is subsequent to that of the locator or appropriator who abandons his right. Any appropriation of the surplus water of the stream, after the abandonment, would unquestionably be treated as a new appropriation, and its priority and date would be fixed in the same manner as other original appropriations. (293) The same results will follow a forfeiture of a right under statute, which is discussed in the following sections.

§ 65. Drainage—Not Beneficial Use—Abandonment.

A landowner is entitled to the natural drainage for surface water flowing across his land, and one who by dams or embankments obstructs such natural drainage and causes such surface water to back up and overflow the land, is liable for the damages resulting therefrom. (294) A diversion of water for drainage, without any intention to apply it to a beneficial

(292) The italics are our own.

(293) *Ante,* §57.

(294) Chicago, B. & Q. R. Co. v. Emmert, 53 Neb. 237, 73 N. W. 540 ('97); Chicago, R. I. & P. R. Co. v. Andreesen, 62 Neb. 456, 87 N. W. 167 ('01); Chicago, R. I. & P. R. Co. v. Shaw, 63 Neb. 380, 88 N. W. 508 ('01); Missouri P. Ry. Co. v. Hemmingway, 63 Neb. 610, 88 N. W. 673 ('02); Todd v. York County, — Neb. —, 100 N. W. 299 ('04); Thompson v. Bolsa Land Co., — Cal. —, 82 P. 207 ('05); Dallas & W. Ry. Co. v. Kinnard, — Tex. —, 18 S. W. 1062 ('92); Hughes v. City of Austin, — Tex. —, 33 S. W. 607 ('95)

use, does not make an appropriation of such water. (295) Water flowing in a drainage ditch without any intention to recapture it, is abandoned. (296)

(*b*) *Forfeiture.*

§ 66. When Forfeiture Favors Growth of Communities.

In the arid states and territories, particularly, the beneficial use of water adds to the assessed valuation of property, increases the products of the state, and causes a material growth in population. In almost all of these states and territories large tracts of land, to which water rights have been attached, have fallen into the speculative hands of persons and corporations who hold it for an expected boom or rise, and who make no improvements and use no water for irrigation, and therefore produce no crops. This practice retards the growth of the community, because in those localities where non-use does not of itself work an abandonment or forfeiture, others dare not incur the expense of putting the water to a beneficial use on other lands, for fear the original appropriator or his successor in interest may suddenly claim or take the use of the water for himself. While the law does not favor forfeitures, (297) nevertheless there is a growing tendency to prevent the holding of valuable water rights in idleness, and several of the states have provided a remedy. (298)

§ 67. Forfeiture or Statutory Abandonment.

In many of the arid and semi-arid states statutes have been enacted providing that a failure to use the water for a certain period, therein specified, shall be

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(295) Thomas v. Guirand, 6 Colo. 530 ('83).
(296) Dougherty v. Creary, 30 Cal. 291, 89 Am. Dec. 116 ('66).
(297) Rominger v. Squires, 9 Colo. 327, 12 P. 213 ('86); Beaver Brook Res. & C. Co., v. St. Vrain Res. Co., 6 Colo. App. 130, 40 P. 1066 ('95); Hall v. Lincoln, 10 Colo. App. 360, 50 P. 1047 ('97); Cooper v. Shannon, — Colo. —, 85 P. 175 ('06); Ada County Farmers' Irr. Co. v. Farmers' Canal Co., 5 Ida. 793, 51 P. 990 ('98).
(298) *Post*, §67.

deemed an abandonment. In 1888 the territorial legislature of Wyoming provided by law that the "failure to use the water for a period of two years should be *deemed* an abandonment," (299) but in 1905 the time was extended to five years. (300) The last period also applies in Idaho. (301) In South Dakota (302) and Oklahoma (303) the period is two years, and in New Mexico (304) it is four years. In North Dakota, it is three years. (305) Some difference of opinion exists as to the construction of the Utah statute, (306) which provides that when one "ceases to use the water for a period of seven years, the right ceases; but questions of abandonment shall be questions of fact and shall be determined as other questions of fact." It is contended by some that the supreme court of Utah, in the case of Promontory Ranch Co. v. Argile, (307) held that non-user under this statute did not work a forfeiture, although the non-use had continued more than seven years, because the intent to abandon was lacking. (308) An examination of that case (309) will show that at no time was there a non-user of the water for seven consecutive years, and therefore there could be no statutory forfeiture, and the intention to abandon being lacking, there was no abandonment. The court says:

"There is evidence in the record which shows that neither respondent nor its predecessor in interest, McDaniel, ceased to use the water in question at any one time for a period of seven years, and there is no evidence in the record, other than that of non-user, which tends to show that it was at any time the intention of respondent or its predecessor in interest to abandon the use of the water for irrigation. There-

(299) Sess. L. 1888, ch. 55, §14; Rev. St., §895.
(300) Sess. L. 1905, p. 36; *post*, ch. 49.
(301) Sess. L. 1905, p. 27, §1; *post*, §963.
(302) Sess. L. 1905, p. 201, §45; *post*, ch. 45.
(303) Sess. L. 1905, p. 274, §28; *post*, ch. 41.
(304) Sess. L. 1905, p. 270, §5; *post*, ch. 43.
(305) Rev. Codes '05, §7651; *post*, ch. 42.
(306) Stats. 1905, ch. 108, §53; *post*, ch. 47.
(307) 28 Utah 398, 79 P. 47 ('04).
(308) Wiel "On Water Rights," §193*a*.
(309) Promontory R. Co. v. Argile, *supra*.

fore, applying the foregoing rules of law to the facts and circumstances of this case, it is apparent that a case of abandonment has not been made out, as no intention to abandon its right to the water on the part of respondent has been shown, except, as stated, the evidence of non-user, which question the court found in favor of respondent."

It would seem, therefore, that had the evidence shown a non-user of the water for the statutory period, a forfeiture or statutory abandonment would have been declared, but that short of seven years' non-use, there must be an intention to abandon accompanied by some act of relinquishment. (310) Oregon has a statute almost identical with that of Utah, only the period of non-use is limited to one year. (311) The language of the former Oregon act provides "that when a ditch is abandoned and thereafter for one year the claimant shall cease to exercise acts of ownership over the same, he shall be deemed to have lost all claim thereto." This act was construed by the U. S. circuit court for the district of Oregon in Ison v. Nelson Mining Co., (312) and an abandonment was declared. In California it is provided by statute,(313) that, "the appropriation must be for some useful or beneficial purpose, and when the appropriator or his successor in interest ceases to use it for such a purpose, the right ceases." This statute fixes no period during which the non-use shall continue. Until the case of Smith v. Hawkins, (314) it was always a difficult question for the jury to say when the continuance of the non-user became unreasonable. In Smith v. Hawkins (314) the court recognized the distinction between abandonment, which is purely a matter of intention, and forfeiture by non-use, which

(310) See, also, Stalling v. Ferrin, 7 Utah 477, 27 P. 686 ('91).

(311) 2 Bal. & C. Code and Stat., §5014.

(312) 47 Fed. 199 ('91); See Frank v. Hicks, 4 Wyo. 502, 35 P. 475 ('94).

(313) Civ. Code Cal., §1411.

(314) 110 Cal. 122, 42 P. 453 ('95).

is a matter of time. The following portion of the opinion, discussing the question of how long the non-user must continue before the right should cease, will give the reader an idea of the reasons that led the court to make this decided departure from precedent:

"Upon this point the legislature has made no specific declaration, but by analogy we hold that a continuous non-user for five years will forfeit his right. The right to use the water ceasing at that time, the rights of way for ditches and the like, which are incidental to the primary right of use, would fall also, and the servient tenement would be thus relieved from the servitude. In this state five years is the period fixed by law for the ripening of an adverse possession into prescriptive title. Five years is also the period declared by law after which a prescriptive right depending upon enjoyment is lost for non-user, and for analogous reasons we consider it to be a just and proper measure of time for the forfeiture of an appropriator's rights for a failure to use the water for a beneficial purpose. Considering the necessity of water in the industrial affairs of this state, it would be a most mischievous perpetuity which would allow one who has made an appropriation of a stream to retain indefinitely, as against other appropriators, a right to the waters therein, while failing to apply the same to some useful or beneficial purpose. Though during the suspension of his use, other persons might temporarily utilize the water unapplied by him, yet no one could afford to make disposition for the employment of same involving labor or expense of any considerable moment, when liable to be deprived of the element at the pleasure of the appropriator, and after the lapse of any period of time, however great." (315)

This case having been carefully considered, the precedent will undoubtedly be followed and will place the limit in California at five years.

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(315) Smith v. Hawkins, 110 Cal. 122, 42 P. 453 ('95).

(c) *Resumption*

§ 68. When Priority may be Resumed.

There is no question but that an appropriator who has abandoned or forfeited his right may resume his right and avoid the effect of the abandonment or forfeiture, provided he does so before another appropriator has acquired any valid rights to the use of such water. (316)

(316) Tucker v. Jones, 8 Mont. 225, 19 P. 571 ('88); Beaver Brook Res. Co. v. St. Vrain Res. Co., 6 Colo. App. 130, 4 P. 1066 ('95).

PART III.

MEANS AND ACCESSORIES FOR CONVEYING AND HOLDING WATER.

CHAPTER 8.

DAMS AND BEDS OF STREAMS.

§ 69. Any Lawful Means Will Suffice.

There is practically no limitation upon the methods, means or accessories that may be used to divert, convey or store appropriated water. The principal requisite is such a situation, convenience or service as will afford a beneficial use of the water. Any means that will enable the appropriator to make a beneficial use of the water, without infringing upon or injuring the rights of other appropriators, may be used. (1)

§ 70. Dams in Bed of Stream.

The appropriator may, whenever it is necessary, place a dam or dams in the bed of the natural stream to raise the water so that it will flow into his ditch, canal or other diverting works, or to hold the water in storage for future use. In doing this he must see to it that the rights of others are in no wise interfered with. (2) He cannot back the water upon the lands above nor can he retain the water so as to impede the regular flow to those below, unless he has acquired a right so to do either by adverse use and prescription or grant. (3) He is liable to other ap-

(1) McCall v. Porter, 42 Ore. 49, 70 P. 820 ('02).
(2) Phœnix Water Co. v. Fletcher, 23 Cal. 482 ('63); Larimer Co. Res. Co. v. People, 8 Colo. 614, 9 P. 794 ('85).
(3) Prescriptive right—Grigsby v. Clear Lake Co., 40 Cal. 396 ('70). Prescriptive right not established—Carson v. Hayes, 39 Ore. 97, 65 P. 814 ('01). See Gould "On Waters," §§305, 343-

propriators and proprietors for any damage that may result from the negligent construction of his dam, and from any overflow caused by its backing up the water. (4) If a stream becomes filled with mud and silt, the appropriator cannot raise his dam higher so as to preserve the natural depth, if in so doing he interferes with the rights of others, regardless of whether they are prior or later in time. (5) Building a dam is a taking possession of the water as a usufruct. (6) An injunction will be issued to restrain one from maintaining a dam, which spreads out the water for cattle to wallow in, so that much is lost by evaporation. (7) In the case of Harrington v. Demaris, (8) the owner of a dam, upon showing that injuries would result to his land by the removal of the dam, was permitted to convey the water to the land of plaintiff, who had a prior right thereto, by means of ditches without the removal of the dam.

344, and cases cited. Grant—Eastman v. St. Anthony's Falls W. P. Co., 43 Minn. 60, 44 N. W. 882 ('90). No right to impede flow or back water on upper proprietor—Stumbo v. Seeley, 23 Neb. 212, 36 N. W. 487 ('88); Hughes v. City of Austin, 12 Tex. Civ. App. 178, 33 S. W. 607 ('95); Booker v. McBride, 16 Tex. Civ. App. 348, 40 S. W. 1031 ('97); Krause v. Ore. I. & S. Co., 45 Ore. 378, 77 P. 835 ('04).

(4) Larimer Co. Res. Co. v. People, 8 Colo. 614, 9 P. 794 ('85); Hughes v. City of Austin, 12 Tex. Civ. App. 178, 33 S. W. 607 ('95); Hall v. City of Austin, 20 Tex. Civ. App. 59, 48 S. W. 53 ('98); Carson v. Hayes, 39 Ore. 97, 65 P. 814 ('01); Krause v. Ore. I. & S. Co., 45 Ore. 378, 77 P. 833 ('04).

(5) Nevada Water Co. v. Powell, 34 Cal. 109, 91 Am. Dec. 685 ('67).

(6) Conger v. Weaver, 6 Cal. 548, 65 Am. Dec. 528 ('56).

(7) Ferrea v. Knipe, 28 Cal. 340, 87 Am. Dec. 128 ('65).

(8) — Ore. —, 82 P. 14 ('05), on rehearing. Between the time of the first hearing reported in — Ore. —, 77 P. 603 ('04), and the rehearing, the supreme court justice who wrote the opinion on rehearing, in company with the attorneys, visited the *locus in quo*, and from the observation of the justice the supreme court on rehearing changed the amount of damages awarded by the *nisi-prius* court and decreed a different specific amount. For the first time an application was made, on rehearing, for permission to retain the dam, and to conduct the water to the land of plaintiff in the court below, by ditches, and the application was allowed and decree modified. See, also, *post*, §148.

CHAPTER 9.

DITCHES, CANALS AND LATERALS.

§ 71. Ditches, Canals and Laterals are Most General Means.

As stated in Sec. 52, there is practically no limitation upon the methods, means or accessories that may be used to divert, convey or store the water appropriated. The method is immaterial, it is the diversion and application to a beneficial use that creates the appropriation. (9) The most general method used in all of the arid and semi-arid states and territories is by artificial ditches, canals and laterals connecting the place or places of use with the source or sources of appropriation. It is not necessary that the appropriator should own the ditch through which he obtains his supply of water; he may convey the water through a ditch or canal owned by another, and his rights in the water so conveyed are such that he can protect them, even before the water reaches his land, from diversion, pollution or other interference. (10) On the other hand, one may own a ditch or canal for the conveyance of water, without being the owner of a "water right," (11) or right to use any of the water by virtue of a completed appropriation, and he may protect the ditch from injury by the proper legal remedy. (12)

§ 72. Ditch or Canal is Real Estate.

The ditch or canal through which the water is conveyed is real estate, and an interest in any such ditch or canal is realty and cannot pass by a verbal sale. (13) In Oregon, by statute, ditches used for mining purposes are regarded as real estate during

(9) McCall v. Porter, 42 Ore. 49, 70 P. 820 ('02).
(10) Clifford v. Larrien, 2 Ariz. 202, 11 P. 397 ('86). See relation between carrier and consumer, *post*, §118.
(11) *Post*, §129.
(12) Stocker v. Kirtley, 6 Ida. 795, 59 P. 891 ('00). See relation between carrier and consumer, *post*, §118.
(13) Barkley v. Tieleke, 2 Mont. 61 ('74); Burnam v. Freeman, 11 Colo. 601, 19 P. 761 ('88); Oppenlander v. Left-Hand D. Co., 18 Colo. 142, 31 P. 854 ('92); McPhail v. Forney, 4 Wyo. 556, 35 P. 773 ('94).

such use, and are governed in their sale and transfer by the law applicable to such property. (14) It has been held that the grant or conveyance of a ditch without specifically mentioning the water, grants or conveys not only the excavated channel but also the grantor's rights to the water by which it is supplied and made valuable, and if the supply of water comes from a second ditch, the conveyance of the ditch so supplied would carry the grantor's interest in the second ditch as part and parcel of the first. (15) One ditch cannot be appurtenant to another, but may be part and parcel of it. (15) This case was decided on the theory that "he who grants a thing is supposed to and does grant that without which the grant is worthless." However, the ditch or canal is entirely distinct from the water right, (16) and either may exist or be conveyed separately if the intention to do so is apparent in the deed. (17) The abandonment of the one does not include the other, (18) but the one may be appurtenant to the other. (18) In many states, as we shall see later, the ditch as well as the water right, becomes appurtenant to the land and passes with a conveyance of the land as an appurtenance, without being specifically mentioned in the deed; (19) but such is not the rule in Colorado. (20)

§ 73. Ditch on the Public Domain.

As we have seen (21) the federal government, by its acquiescence and encouragement, amounting

(14) 2 Bal. & Cot. Codes and Stat., §3983; Mattis v. Hosmer, 37 Ore. 531, 62 P. 17 ('00).
(15) Donnell v. Humphreys, 1 Mont. 518 ('72).
(16) *Post*, §129.
(17) Zimmler v. San Luis Water Co., 57 Cal. 221 ('81); Rogers v. Riverside L. & Irr. Co., 132 Cal. 9, 64 P. 95 ('01); Arnett v. Linhart, 21 Colo. 188, 40 P. 355 ('95).
(18) Zimmler v. San Luis Water Co., 57 Cal. 221 ('81); McLear v. Hapgood, 85 Cal. 555, 24 P. 788 ('90); Mayberry v. Alhambra Co., 125 Cal. 444, 54 P. 530 ('98); 125 Cal. 444, 58 P. 68 ('99).
(19) *Post*, §130; Tucker v. Jones, 8 Mont. 225, 19 P. 571 ('88). If circumstances show the intention of the grantor although deed silent—Am. Nat. Bank v. Hoffer, 18 Colo. App. 53, 70 P. 156 ('02).
(20) *Post*, §130.
(21) *Supra*, §§21-23.

practically to a license, induced miners and others to construct canals and ditches to be used in mining operations and for agricultural and other beneficial purposes, and that in 1866 congress recognized these pre-existing rights. (22) Prior to the passage of this act it was the custom recognized by the federal government for miners to go upon the unoccupied public domain and construct their canals or ditches, and those who thereafter located upon and obtained title to such public domain did so subject to the prior rights of the owner of the canal or ditch, and such subsequent locator could not recover any damages for the digging of the canal or ditch, nor the use of the right of way. (23) The act of 1866 was amended by the act of July 9, 1870, §9, now §2340 of the U. S. Revised Statutes, and the amendment provides that thereafter all land patents issued by the federal government shall contain a clause to the effect that the patented land is subject to all vested rights of way for canals and ditches. (24)

§ 74. Liability of Canal or Ditch Owner.

There is no liability imposed upon the owner of a canal or ditch, existing by lawful authority, for damages resulting from the mere existence of the ditch. (25) But the ditch owner is required to use such care in the construction and management of the canal or ditch as a man of average prudence and intelligence would employ under like circumstances to protect his own property, and this rule applies to municipalities engaged in furnishing water by means of canals or ditches. (26) He is bound to so construct the ditch that it will carry the flood waters, which he knows periodically flow, and he

(22) Act July 26, 1866, §17, U. S. Rev. Stat., §§2339, 2340; Broder v. Water Co., 101 U. S. 275 ('79).

(23) Shoemaker v. Hatch, 13 Nev. 261 ('78); Platte and Denver C. & Mill. Co. v. Mayor of Denver, 2 Colo. App. 184, 29 P. 1036 ('92); Carson v. Gentner, 33 Ore. 512, 52 P. 506 ('98).

(24) *Post*, §§168, 169.

(25) City v. Mullin, 7 Colo. 345, 3 P. 693 ('84); Platte & Denver D. Co. v. Anderson, 8 Colo. 131, 6 P. 515 ('84); Walley v. Platte & Denver D. Co., 15 Colo. 579, 26 P. 129 ('90).

(26) City of Boulder v. Fowler, 11 Colo. 396, 18 P. 337 ('88).

will be held liable in damages for injuries caused by his failure to do so. (27) He is liable for injuries caused by water overflowing, escaping or seeping from the canal or ditch, and the owner of the land injured cannot he held guilty of contributory negligence, (28) and this liability arises from the failure to use ordinary care in preventing the escape of the water. (29) The measure of damages is discussed under the title, "Remedies, Pleading and Practice." (30)

CHAPTER 10.

RESERVOIRS.

§ 75. Storage of Flood Waters.

It is a matter of common knowledge that all streams and springs flow with the largest volume of water in the spring and early summer, owing to the melting snows in the mountains, the spring rains, and the seepage from the watershed, of the waters stored in the earth by absorption during the previous months. As a general rule these waters reach the stream too early, and in too large a volume, to be entirely utilized by the general class of appropriators, and therefore thousands, if not millions, of cubic feet of water per second flow down to the sea without performing the duty (31) required in the

(27) Burbank v. W. W. R. D. Co., 13 Nev. 431 ('78); Catlin L. & C. Co. v. Best, 2 Colo. App. 481, 31 P. 392 ('92).
(28) Shields v. Orr. Ex. D. Co., 23 Nev. 349, 47 P. 194 ('97); Greeley Irr. Co. v. House, 14 Colo. 549, 24 P. 329 ('90); Consolidated, etc., Co. v. Hamlin, 6 Colo. App. 341, 40 P. 582 ('95); Arave v. Ida. C. Co., 5 Ida. 68, 46 P. 1024 ('96); Stuart v. Noble D. Co., 9 Ida. 765, 76 P. 255 ('04); Jenkins v. Hooper Irr. Co., 13 Utah 100, 44 P. 829 ('96); Lisonbee v. Monroe Irr. Co., 18 Utah 343, 54 P. 1008 ('98); North Point Con. Irr. Co. v. Utah & S. L. Canal Co., 16 Utah 246, 52 P. 168 ('98); Bacon v. Kearney V. Synd., — Cal. —, 82 P. 84 ('05). This subject is more fully discussed under the title, "Remedies, Pleading and Practice," *post*, Part VII.
(29) Platte & Denver D. Co. v. Anderson, 8 Colo. 131, 6 P. 515 ('84); Denver City Irr. & W. Co. v. Middaugh, 12 Colo. 434, 21 P. 565 ('89).
(30) *Post*, §157.
(31) *Ante*, §59.

arid and semi-arid West. The storage of these flood waters for use during the summer months, for power, irrigation, domestic and other uses, at a time when the natural flow of the stream will not furnish a sufficient supply for the needs of the appropriations, is one of the solutions of the ever-present shortage-of-water problem. There have been constructed in the past, many small reservoirs and a few large ones, but the modern reservoir project is generally on a scale of great magnitude and requires too much capital for private enterprise. It was not until the federal government entered upon the work of reclaiming the arid West (32) that the enormous dams and reservoirs now under construction were made possible projects. By utilizing the flood waters in this manner and wholly absorbing and applying them, many millions of acres will be brought under cultivation, and other uses will be supplied, and increased in like proportion; (33) and in course of time, too, the destructive floods of the Missouri and Mississippi rivers will be a thing of the past.

§ 76. Right to Construct Reservoirs.

By statute, in many of the arid and semi-arid states, the construction of reservoirs for the storage of the flood waters of the streams and rivers is directly encouraged. (34) As in the case of appropriation of water for immediate use, so it is necessary for the reservoir claimant to respect the rights of other appropriators and landowners. His appropriation of water for storage is subservient to the rights of all prior appropriators. (35) He can utilize as a reservoir site, natural depressions upon the public domain, (36) and he may use the bed or channel of the natural stream, or its source, for the storage of water, but he must not impair the superior rights of others. (37)

(32) *Post*, §104.
(33) *Post*, §107.
(34) Statutes of states and territories, *post*, Part X.
(35) *Supra*, §54.
(36) Beaver Brook Res. Co. v. St. Vrain Res. Co., 6 Colo. App. 130, 40 P. 1066 ('95).
(37) See *ante*, §70; Larimer Co. Res. Co. v. People, 8 Colo. 614, 9 P. 794 ('85).

The storage of water for future beneficial uses has been declared by statute and decisions of the courts to be a public use, (38) and to carry the right of eminent domain. (39) The construction of a reservoir does not *ipso facto* make an appropriation of water. Where there are statutes upon the subject the water must be appropriated in accordance with their provisions. (40) The appropriation is dependent upon beneficial use within a reasonable time, as we have seen is the case with all other appropriations. (40)

§ 77. Locations on Government Land—State Control.

By act of congress, (41) it is provided that by the filing of certain petitions, affidavits and statements(42) with the land department of the United States, and the approval of the same by the commissioner of the general land office, a license or quit-claim (43) for a reservoir site, so far as the rights of the government are concerned, is granted to the reservoir locator. The grant also extends to him a right of way over the public domain for his connecting canal or ditch. This license or quit-claim, however, does not affect prior rights obtained by others. (43) In most if not all the arid and semi-arid states and territories the construction of reservoirs, at least of a certain size, whether upon public or private lands, is under the supervision of public officers designated by statute, (44) who examine and approve or disapprove of the plan of construction and supervise the work as it progresses; and who also may make such orders relative to the construction or maintenance of the reservoir as the safety of the public demands. This

(38) Statutes states and territories, *post*, Part X; Rupley v. Welch, 23 Cal. 453 ('63); Los Angeles v. Pomeroy, 124 Cal. 597, 57 P. 585 ('99).
(39) See title Eminent Domain, *post*, §§159-163.
(40) Beaver Brook Res. Co. v. St. Vrain Res. Co., 6 Colo. App. 130, 40 P. 1066 ('95).
(41) A. C. 1891, 26 Stat. 1101, §§17-21, Rev. Stat. 1 Supp. (2d ed.), 945, §17; A. C. 1897, 29 Stat. 599.
(42) For forms, apply to local U. S. Land Office or General Land Office at Washington.
(43) Nippel v. Forker, 9 Colo. App. 106, 47 P. 766 ('97).
(44) Statutes states and territories, *post*, Part X.

is a precautionary measure to protect the public from danger and possible injury, resulting from faulty or weak construction.

§ 78. Liabilities of Owners.

The owner or owners of a reservoir are liable in damages for injuries caused by overflow, breaking of the dam or embankment, and seepage. (45) In Colorado this is provided for by statute, but it has been held that the statute (46) is simply an affirmation of a common-law principle, and does not change the rule concerning relief. (47) A person may be the "owner" of a reservoir within the meaning of the statute providing that the "owners of reservoirs shall be liable for all damages," etc., although his interest therein be less than an absolute fee; a lessee of a reservoir is such an owner. (48) In an action for damages it is not necessary to allege and prove negligence, as the proof of the damage by the breaking of the reservoir makes a *prima facie* case, which throws the burden upon the owner to disprove negligence. (49)

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(45) Sylvester v. Jerome, 19 Colo. 128, 34 P. 760 ('93).
(46) 1 Mills' Ann. Stat., §2272.
(47) Sylvester v. Jerome, 19 Colo. 128, 34 P. 760 ('93).
(48) Larimer Co. Ditch Co. v. Zimmerman, 4 Colo. App. 78, 34 P. 1111 ('93).
(49) *Id.* See, also, title, "Remedies, Pleading and Practice," *post*, Part VII.

PART IV.

STATE AND FEDERAL CONTROL AND DISTRIBUTION.

CHAPTER 11.

WATER DISTRICTS, DIVISIONS AND OFFICERS.

§ 79. State Engineer.

As we have seen, the early customs required merely the taking of the water and its application to a beneficial use. (1) No formal records or notices were required, and the method of the appropriation of water was exceedingly simple. The early legislation on the subject required the posting of a notice at the point of diversion, and the recording of a copy of the notice in the office of the county clerk and recorder of the county where the diversion was to be made. This was the first step toward establishing a record of appropriations other than those contained in court decrees. But it proved very unsatisfactory. In many instances streams ran through several counties, and an appropriator, in order to ascertain with any degree of accuracy the number of appropriations from a given stream, and their extent, was obliged to search the records of each county through which the stream flowed. No tabulated statements of the ditches and appropriations were kept, no maps showing the location, size and character of the diverting works were on file, and no measurements of the streams were made by any official. It was therefore almost impossible for an intending appropriator to ascertain whether or not there was any unappropriated water flowing in the stream, and he might expend his time and money in constructing ditches or canals, only to find that dur-

(1) *Supra*, §43.

ing the period of low water, when water is usually most needed, there was none to be had. Born of such conditions, the idea of a central control has been gradually growing, and more power has been conferred upon those in control, in order that appropriations and diversions might be made with a reasonable knowledge of what water there was left to appropriate. Either directly or by gradual stages of evolution a state engineer was the officer finally fixed upon, and in some if not most instances, such an officer was created for the express purpose of having a general supervision over the waters of the state. (2) At first in several of the states his authority was almost entirely administrative, and he had but little executive power. Maps and statements were to be filed in his office and to be approved by him as to form. But he had no power to reject a filing because of the fact that the entire flow of the stream had already been appropriated. He was required to make measurements of the flow of the streams of the state and to preserve records of the same. He early came to have a general supervision over the various officers engaged in distributing the waters of the state according to the priorities of the respective claimants, and to a certain degree he was a judge of the disputes that arose between the division or district officers and appropriators. The states of California (3) and Kansas, and the territory of Arizona, have no state officers charged with any specific duty relative to the appropriation or distribution of the waters of the state.

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(2) The reader must not infer from our text that the officering of the irrigation system in the several states has always begun with a state engineer or equivalent officer, and has developed logically from the highest to the lowest official. In Colorado the precise evolution of irrigation districts, divisions and officers has been as follows: Water districts and commissioners, 1879 (1 Mills' Ann. Stat., §§2310-20, 2381-92); water divisions and state engineer, 1881 (1 *Id.*, §§2440-42, L. '81, pp. 119-22, §§1-12); division superintendents, 1887 (1 *Id.*, §§2447-57); irrigation division engineers, superseding superintendents, 1903 (3 *Id.*, 2d ed., §§2440-2447*m*).

(3) This omission in California, with its great volume of irrigation statutes and decisions, is certainly anomalous and almost inexplicable.

§ 80. State or Territorial Irrigation and Hydraulic Engineers Under the Irrigation Codes.

In those states and territories following the Wyoming system, (4) the supervision of the waters of the state is delegated to an officer bearing various titles, such as state or territorial irrigation and hydraulic engineer, but the duties and powers in each instance are about the same. By this system the engineer is given a large discretionary power. It is his duty to measure the streams of the state and ascertain the average minimum flow, and keep in his office records of the same. No appropriation of water can be made except under a permit issued by him. An application must be filed, (5) describing with considerable detail the character of the diverting works and the use or uses to which the water is to be applied, and the estimated time necessary to complete the diversion and application. Accompanying this application there must be a map in duplicate. He may, as we have seen, (6) reject the application or grant the permit, and in granting the permit he may fix the time for completing the diversion and application. Appeals lie from his decisions to the board, styled differently in many of the states. (7) but in reality a board of control, or irrigation board, of which he is a member, and from the decisions of the board appeals lie to the courts. The engineer has a general supervision over the division and district officers who are engaged in the work of distributing the waters. His records being complete, he is able to determine with reasonable accuracy whether or not there is any unappropriated water in a given stream. Thus is prevented the unseemly spectacle, only too frequent under the previous system, of appropriations from natural streams being made which are far in excess of its maximum, not to mention its minimum, flow.

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(4) *Supra*, §53.

(5) See Forms, *post*, Part X.

(6) *Supra*, §53.

(7) *Ante*, §53; *post*, §§143, 144; Statutes of states and territories, *post*, Part X.

§ 81. Division Superintendents and Engineers.

The arid and semi-arid states and territories are by statute divided into irrigation divisions, each division embracing the entire drainage of a given stream, and over which a superintendent or other division officer (8) has general authority as the assistant to the engineer. (9) The power conferred upon the superintendents is a part of the police power of the state. (10) As superintendents, their power is generally executive and not judicial; but in states where the division superintendents constitute the board of control, their power is *quasi*-judicial. (11) In some of the states the division superintendent is paid by the counties within his district for the time actually devoted to the performance of his duties. In Colorado it has been held that a county that has no land in it irrigated by water from natural streams within a certain irrigation division is not liable for any part of the salary of the superintendent of that division. (12) In most of the states and territories, however, the superintendents are paid by the state at a *per diem* rate. In Wyoming the salary is fixed at $1,200 per year. (13) In Colorado, division superintendents have been abolished and "Irrigation Division Engineers" are appointed by the governor upon competitive examination. (13*a*)

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(8) In Nebraska these division officers are styled "Under Secretaries," Comp. Stat. '05, §6419. In South Dakota they are called "Water Commissioners," Sess. L. '05, p. 210, §§37-43; same in North Dakota, Rev. Codes '05, §§7640-7644, and in New Mex., Sess. L. '05, p. 278, §24.

(9) Farmers' Independent D. Co. v. Maxwell, 4 Colo. App. 477, 36 P. 556 ('94); statutes, states and territories, *post*, Part X.

(10) Farmers' Ind. D. Co. v. Agricultural D. Co., 22 Colo. 513, 45 P. 444 ('96).

(11) Farm. Inv. Co. v. Carpenter, 9 Wyo. 110, 61 P. 258 ('00).

(12) Chapman v. Bd. of Co. Com. of Phillips Co., 17 Colo. App. 236, 68 P. 134 ('02); Chew v. Board of Co. Comrs. of Fremont Co., 18 Colo. App. 162, 70 P. 764 ('02).

(13) Statutes states and territories, *post*, ch. 49.

(13*a*) 3 Mills' Ann. Stat. (2d ed.), §§2440-2447*m*. See, also, *ante*, §79, note 2.

§ 82. Water Districts.

Each division is subdivided into districts for administrative purposes, over which is appointed a water commissioner or master, although in some states and territories he bears a different title. (14) These water districts (15) should, and in most instances they do, embrace some particular tributary of the main river or stream constituting the irrigation division. An instance in Colorado shows the disastrous results that follow from two districts upon the same tributary or stream. Water district Sixty-eight, (16) created in 1889, includes that portion of the Uncompahgre river and its tributaries from its source down to the county line between Ouray and Montrose counties; and district Forty-one, (17) created in 1887, includes that portion of the river and its tributaries from the Ouray county line through Montrose and Delta counties to its junction with the Gunnison river. The court decrees show that the waters of this river were appropriated many times over, in district Forty-one, prior to the appropriations in district Sixty-eight; nevertheless later appropriations have been made in the upper district, Sixty-eight, to such an extent that until within the past few years the appropriators in district Forty-one claim, during the low water period, to have been practically deprived of their supply. It is true that by statute (18) it is made the duty of the division superintendent to shut down the *post*-dated ditches in one of the districts where ditches of earlier priority in the other are not getting the supply to which they are entitled; but he can only act according to the dates established by the court decrees, and if these are wrong, or the priorities have not been adjudicated and established, he seems to be

(14) Statutes, states and territories, *post*, Part X. In Nebraska this officer is called "Under Assistant," Comp. Stat. '05, §6442.

(15) The water districts here spoken of must not be confounded with incorporated irrigation districts. See *post*, §§98-103.

(16) 1 Mills' Ann. Stat., §2380.

(17) 1 Mills' Ann. Stat.. §2353.

(18) 1 Mills' Ann. Stat., §2456.

powerless to protect the appropriator with prior rights in a lower district. Adjudications are not made between the different districts at the cost of the state or county, but at individual or corporation cost, (19) and in the instance just referred to such a proceeding was estimated to be so expensive as to prevent the appropriators from undertaking it. Nevertheless it would probably have been forced upon them had it not been for the projection of the "Gunnison Tunnel" (20) now being constructed by the federal government, which, when completed, will furnish ample water for the whole valley. By including an entire stream and its tributaries within one district, all of the appropriations are under the same administration, the priorities are ascertained and fixed with reference to all others, prior and subsequent, and one officer has the charge of distributing the water to all of the appropriators from the stream. (21) The same, or a similar objection, to more than one water district on the same stream also applies to a system composed of water districts only; hence the need and advantage of water divisions embracing all the water districts of an entire network of streams and rivers in the same general drainage under the control of a superintendent or competent engineer. (22) In Colorado these water districts are created by statute. (23) In Idaho the board of irrigation shall divide the state into "water districts" to be so constituted as to secure the best protection to the claimants for water. (24) In Nebraska the state board of irrigation may create water districts as necessary, upon petition of the parties interested. (25) In Nevada the state board of irrigation shall divide the state into "water sub-divisions." (26) In Utah, Oklahoma and North Dakota the districts shall be created by the state engi-

(19) The only adjudication provided for is 1 Mills' Ann. Stat., §§2339 *et seq.*
(20) *Post*, §107.
(21) Statutes, states and territories, *post*, Part X.
(22) See preceding section.
(23) 1 Mills' Ann. Stat., §2310.
(24) Sess. L. 1903, p. 240, §23.
(25) Comp. Stat. '05, §6441.
(26) Stat. '01, p. 72.

neer. (27) In Wyoming the state board of control creates the "water districts" as necessity arises. (28) In Washington each county is by statute made an irrigation district. (29)

§ 83. Water Commissioners—Masters—Supervisors—Under Assistants.

Each water district is provided with an officer indifferently styled, "water commissioner," (30) "water master," (31) "under assistant," (32) and "supervisor." (33) These officers are all appointed either by the governor or some of the irrigation officers. (34) The district officer has, subject to the direction of the superintendent or engineer of the division, charge of the regulation of the respective headgates and the distribution of the water within his district, in accordance with the priorities of the various ditches or canals, and "in whole or in part to shut and fasten, or cause to be shut and fastened, by order given to any sworn assistant, sheriff or constable of the county in which the head of such ditch is situated, the headgates of any ditch or ditches heading in any of the natural streams of the district, which in time of scarcity of water shall not be entitled to water by reason of the priority of rights of others below them on the same stream." (35) These officers are empowered and required "upon the application of the owners of one or more ditches in their district, to immediately make, or cause to be made, a thorough examination of all ditches within their district for the purpose of ascertaining what use is

(27) Utah Laws '05, ch. 108, p. 154, §26; Oklahoma Sess. L. '05, p. 290, §32; North Dakota Rev. Code, '05, §7645.
(28) Rev. Stats. '99, §888.
(29) Pierce's Code '05, §5840.
(30) California—By statute water commissioners were appointed in a few counties, Stat. of 1854, p. 76, amended 1862, p. 234. Colorado—1 Mills' Ann. Stat., §§2384-2392. Nevada—Stat. '01, p. 72. Wyoming—Rev. Stat. '99, §§888-889.
(31) Idaho—Sess. L. '03, p. 240, §§23-24. Oklahoma—Sess. L. '05, p. 290, §33. North Dakota—Rev. Codes '05, §7646.
(32) Nebraska—Comp. L. '05, §§6442-6444.
(33) Utah Laws '05, ch. 108, p. 154, §26 *et seq.*
(34) See statutes referred to in preceding notes.
(35) 1 Mills' Ann. Stat., §2384, *post*, Part X, ch. 35.

being made by the owner or owners of, or consumers of water from, said ditches; and if at any time he shall ascertain that the owner or owners of any ditch drawing water from the natural streams furnishing water to his district shall be permitting any of the waters flowing in such ditch to go to waste, or to be wastefully or extravagantly or wrongfully used by its water consumers, or put to any other use than that to which it is entitled to be used in the order of priority, at such times as the same is being needed by other appropriators, it shall be the duty of such water commissioner to immediately shut off the supply of water in such ditch to such an extent as in his judgment was wasted or extravagantly, wastefully or wrongfully used." (36)

In most of the states and territories the district officer shall not begin his work until called in writing by two or more owners or managers or persons controlling ditches in his particular district, stating that there is a necessity for his action. (37) In many of the states and territories these officers are vested with the power of constables, and may arrest persons violating their orders. (38) They are in the nature of water police, whose duty it is to protect the rights of appropriators, and to see that the law relating to the diversion of water is impartially enforced. They should be equipped with the knowledge and ability which will enable them to measure with reasonable accuracy the flow of water in ditches and streams. Rules for such measurements are given in another part of this work. (39) District officers are paid by the counties in which their respective districts are situated, such sum *per diem* as is fixed by statute (40) In this section the quotations have been made from the Colorado statutes, as that state appears to have furnished the model upon this particular

(36) 3 Mills' Ann. Stat. (2d ed.), §2384*a*.
(37) 1 Mills' Ann. Stat., §2292. See statutes, *post*, Part X.
(38) Statutes, states and territories, *post*, Part X.
(39) *Post*, §§88-92.
(40) Statutes, states and territories, *post*, Part X; Board of County Com. v. Locke, 2 Colo. App. 508, 31 P. 351 ('92); Board of County Com. v. Gould, 6 Colo. App. 44, 39 P. 895 ('95).

feature for the other states and territories. The duties of these officers in all jurisdictions are very similar, and it is unnecessary at this place to repeat the statutes of each commonwealth. (41)

CHAPTER 12.

POLICE POWER.

§ 84. Police Power as to Water Rights.

By the constitution or statutes of many of the states and territories the water of the natural streams within the state is declared to be the property of the people or the public, (42) and by statutes or decisions in all of the states the use of water for irrigation is deemed a public use. (43) It would naturally follow, therefore, that the use of water must be subject to the control of the state, and as we have seen, all of the arid and semi-arid states and territories have enacted statutes, and some elaborate codes, providing for the regulation and control of the appropriation and distribution of water for beneficial uses, and particularly for irrigation. In the case of the Farmers' Highline Canal & Res. Co. v. Southworth, (44) Mr. Justice Elliott said:

"The authority of the general assembly to enact laws regulating the distribution of water to actual appropriators, providing they do not substantially affect constitutional or vested rights, is undoubted. While the legislature cannot prohibit the appropriation or diversion of unappropriated water, for useful purposes, from natural streams upon the public domain, it has the power to regulate the manner of effecting such appropriation or diversion by reasonable and constitutional legislation." (45)

(41) *Post*, Part X.
(42) Const. and statutes, *post*, Part X.
(43) *Post*, §§161, 162.
(44) 13 Colo. 111, 137, 21 P. 1028 ('89).
(45) See Larimer Co. Res. Co. v. People, 8 Colo. 614, 9 P. 794 ('85); White v. Farmers' Highline C. & R. Co., 22 Colo. 191, 43 P. 1028 ('96); U. S. Freehold L. & E. Co. v. Gallegos, 1 Leg. Adv. 412 ('98).

Accordingly, it is held that the determination of priorities by adjudication proceedings is incidental to a proper regulation of the use of water, and to secure the orderly distribution of the water to the various appropriators. (46) We have in the preceding sections examined the methods provided for exercising this right of state control. In several of the states the statutes have been attacked upon the ground of unconstitutionality, as a taking of property without due process of law, and also as conferring judicial powers upon officers and boards not designated as judicial by the constitution. Such adjudication acts have been held constitutional as to both objections. (47) In the states following the Colorado method of adjudication and distribution the division superintendents and the water commissioners are governed in their distribution of the water by decrees of the courts. They are clothed with no judicial or discretionary power except to prevent waste, (48) and the courts are always open to restrain such officers from performing their duties in a manner not contemplated by law. (49) In the states following the Wyoming method, these officers make their distribution of the water according to the decrees of the board of control. The constitutionality of the act providing for adjudication by the board has been attacked in both Wyoming and Nebraska. These cases are discussed under another title in this work. (50) They sustain the right of the board to adjudicate the priority of right of the various appropriators as a *quasi*-judicial function, and in Wyoming it is held that the police power of the state to control and regulate the use of the water of natural streams

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(46) Cases cited in notes 44, 45. Golden Canal Co. v. Bright, 8 Colo. 144, 6 P. 142 ('84).

(47) Farmers' Ind. D. Co. v. Agricultural D. Co., 22 Colo. 513, 45 P. 444 ('96); Farm Inv. Co. v. Carpenter, 9 Wyo. 110, 61 P. 258 ('00); Farmers' Irr. Dist. v. Frank, — Neb. —, 100 N. W. 286 ('04).

(48) *Post*, §85.

(49) *Post*, §§150-153.

(50) Cases cited in note 47. *Post*, §§143-146.

applies to those whose rights accrued prior to the adoption of the constitution as well as to those who have acquired their right since that time. (51)

CHAPTER 13.

DISTRIBUTION.

(*a*) *In General.*

§ 85. Distribution According to Decrees.

As we have seen, (52) the states and territories in the exercise of the police power and to secure an orderly and peaceful distribution of the waters, have assumed the entire control of the distribution, and have provided officers whose duty it is, in this respect, to enforce the laws of the state, the decrees of the courts and the adjudicating boards. The officers are governed entirely by the court or board records, both as to the amount of water to which an appropriator is entitled and as to the order in which he shall be served. By the priority system, the biblical saying, "the last shall be first," is applied during the periods when there is not enough water for all, by shutting off the last appropriator's supply first, (53) and by means of headgates or measuring flumes or boxes, delivering to the others, in the order of their priority, the amount of water which the record shows them entitled to. The statutes of all the arid and semi-arid states and territories aim at an economical and beneficial use of the water, *without waste*, and therefore confer upon the division and district officers certain discretionary powers, in determining when an appropriator's needs have been amply supplied, and whether or not he is making a beneficial use of the water, and if not, then in empowering such officers to shut off the supply. (54) While an equitable

(51) Farm Inv. Co. v. Carpenter, 9 Wyo. 110, 61 P. 258 ('00).
(52) *Supra*, §§79, 80.
(53) Larimer Res. Co. v. Water Sup. & Storage Co., 7 Colo. App. 225, 42 P. 1020 ('95).
(54) Statutes, states and territories, *post*, Part X.

distribution of the water of a stream, to all having cultivable lands under any of its ditches, regardless of priorities, might greatly enhance the benefits to be derived from the use of the water, still, such equitable distribution is impossible where the respective rights depend as they do upon dates of appropriation. (55) By statute in Wyoming it is provided that when the consumers who obtain their supply of water through a partnership ditch are unable to agree on the distribution of the water flowing in the ditch, any one of them may apply to the district court for the appointment of a suitable person to make the distribution, and that the decision of the court, judge, or court commissioner shall be final. (56) This statute was amended, (57) so as to make such decision final unless an appeal is taken to the district court. In construing this section and the amendment, the supreme court held that the decision of the district court was final and no appeal to the supreme court would lie. (58)

(*b*) *Pro-rating and Rotation.*

§ 86. Pro-rating Principally in Colorado.

By 1 Mills' Ann. Stat., §2267, it is provided that the water actually received into and carried by any irrigating ditch, canal or reservoir, to the consumers therefrom, may be pro-rated among all such consumers in time of scarcity. In 1889 this statute was discussed by the supreme court justices in the case of the Farmers' Highline Canal Co. v. Southworth. (59) The case came to the supreme court from the decision of the trial court in overruling a demurrer to the complaint. Each of the three justices filed a separate opinion, agreeing in a reversal of the case, but reaching this conclusion by distinctly different lines of reasoning. Hayt, J., expressed the view that the only

(55) Larimer and Weld Res. Co. v. Cache La Poudre Irr. Co., 8 Colo. App. 237, 45 P. 525 ('96).
(56) Rev. St. 1899, §910; *post*, ch. 49.
(57) Sess. L. 1903, p. 122, ch. 93; *post*, ch. 49.
(58) Mau v. Stoner, — Wyo. —, 83 P. 218 ('05).
(59) 13 Colo. 111, 21 P. 1028 ('89).

question presented was the sufficiency of the allegation as to the priority of the plaintiff over the other consumers through the same ditch, and held that the complaint stated a legal conclusion and the demurrer should have been sustained. Helm, J., said that under the pleadings the question presented was: "Does the 'priority of appropriation,' which by virtue of the constitution gives the better right, apply to individual consumers taking water through the agency of a carrier, so that, notwithstanding the pro-rating statute, each consumer acquires a separate constitutional priority of right, entitled to judicial enforcement, dating from the beginning of his specific use?"

This justice reached the conclusion that consumers taking water from the same carrier within a reasonable time after the carrier's diversion have the same constitutional priority dating from such diversion, and as to such consumers the pro-rating statute is constitutional. Elliott, J., who tried the case below, and who joined in a reversal of his own *nisi-prius* decision, in an elaborate opinion, held that as between those using the water of natural streams for the same beneficial purpose, priority of use gives superiority of right, irrespective of the mode of diversion; and this rule is applicable to individual consumers, as between themselves, when they receive the water through the agency of an artificial stream as well as when they receive the same direct from the natural stream, and therefore the pro-rating statute of 1879 must be limited accordingly. This latter opinion is perhaps accepted as the law upon this question in Colorado. This case is cited by Hayt, J., in the case of Larimer & Weld Irr. Co. v. Wyatt, (60) as holding that in times of scarcity of water the pro-rating statute (61) may be resorted to to compel the pro-rating of water among consumers having priorities of the same, or nearly the same, date. This statute reaches all consumers and co-consumers who have secured priorities by carrier or community ditches

(60) 23 Colo. 480, 48 P. 528 ('97).
(61) *Supra*, this section.

and does not conflict with the provisions of the constitution prohibiting class legislation. (62) The consolidation of two canals or ditches having priorities of different dates, in the absence of an agreement to that effect, does not operate to place the rights of the consumers of the old canals or ditches upon an equality; (63) nor does a subsequent enlargement of a ditch or canal entitle those who acquire rights under such enlargement, to pro-rate with those whose rights were secured under the original ditch or canal. (64)

§ 87. Rotation.

The system of pro-rating, as provided by statute in Colorado, (65) has not been regarded as a marked success by those whose position has required them to apply it. During the usual low-water period, the average crop needs a thorough irrigation, as much if not more than at any other period. By pro-rating the water, each consumer is given a certain percentage of his regular flow, which in many instances is too small to be of any material benefit to the crop, and frequently supplies scarcely more water than is needed for domestic use. Experience has proven that a crop *well* irrigated will prosper and grow without further irrigation for not less than ten or fifteen days; that the appropriator, if given a full supply of water, can usually irrigate his entire crop in from three to five days of the usual twenty-four hours each. It has been found, therefore, where tried, that by rotation, *i. e.*, giving a full head of water to as many ditches as the stream would supply, or if on a private canal or ditch, to as many consumers or co-consumers as the main canal would supply, for not to exceed five days, and then passing on the full supply to the next group, would make the water do far greater

(62) Helm, J., in Farmers' Highline C. & R. Co. v. Southworth, 13 Colo. 111, at pp. 121, 122, 21 P. 1028 ('89).
(63) Nichols v. McIntosh, 19 Colo. 22, 34 P. 278 ('93).
(64) Brown v. Farmers' Highline C. & R. Co., 26 Colo. 66, 56 P. 183 ('99). As to parties in actions to restrain pro-rating, see *post*, §151.
(65) *Ante*, §86. For rotation under the Roman law, see *ante*, §§3, 4. Rotation is also mentioned, *supra*, §29.

service and produce more and better crops than under the system of pro-rating. The success already achieved from rotation augurs well for the future, and appropriators frequently see in a full head something even better than a priority.

In the early days, as we have seen, (66) but little if any check was placed upon appropriators, and, diversions of water were frequently made far in excess of the need, and were later given a decreed priority by the courts. These excessive priorities generally leave room for litigation when the water commissioner undertakes to lessen the diversion. The question of the appropriator's needs, as we mentioned above, (67) is often in his discretionary keeping, and as this question is one of fact dependent upon many circumstances, differing in each case, it is sometimes difficult for a court, within the short period of time when the flow is at its lowest, to reach a trial and conclusion of the case. These and other vexations have led the later appropriators of water to study with deep interest the system of rotation, and they have awakened, too, an interest in the early appropriators who keenly appreciate the advantage of a "full head" of water at definite intervals and are willing to make concessions to get it.

With "priority" men and late comers thus attracted to the new system, and reinforced by the veritable boom that is now on in building reservoirs, who knows but "rotation" will ultimately become the favorite and universal irrigation system of the arid West. (68) In the recent case of Anderson v. Bassman, (69) the United States circuit court for the northern district of California entered a decree applying the system of rotation, by restraining the defendants from diverting the waters in excess of five days in every ten days during the months of June, July, August, September and October of each year.

(66) *Ante*, §58.
(67) *Supra*, this section.
(68) This question is discussed and a number of instances where rotation has been successfully tried are cited in Bulletin No. 86, U. S. Dept. Agriculture, pp. 116, 119, 188, 201, 237.
(69) 140 Fed. 14, 29 ('05).

CHAPTER 14.

MEASUREMENT OF WATER.

§ 88. Difficulties of the Subject.

The measurement of water is one of the most complicated subjects. Modern science has not yet satisfactorily solved the problem. Under some conditions present methods give accurate results; but the conditions surrounding the measurement must be exact and allow of but little variation. It is not the object of this chapter to go into detail as to the reasons for errors and inaccuracies, but merely to mention some of the most approved methods of the measurement of water.

§ 89. Units of Measurement.

GALLON.—The standard U. S. gallon contains 231 cubic inches. There are 7.4805 gallons in a cubic foot. This unit is generally used to give the supply furnished cities, boiler plants, and in the unwatering of mines and the discharge of tunnels.

CUBIC FOOT.—The cubic foot is the amount of substance or fluid contained in a cube of one foot dimensions. One cubic foot of water weighs 62.408 lbs. at 50 degrees Fahr. This unit, or the acre-foot, is used to give the capacity of reservoirs.

CUBIC FOOT PER SECOND.—By the term "cubic foot per second," as applied to flowing water, is meant a cubic foot of water passing a given point every second of time. A "cubic foot per second" is often designated as a "second foot." This term is used to express the discharge of ditches, canals and rivers, and of all natural streams of running water.

ACRE-FOOT.—An acre-foot of water is the amount of water that will cover one acre of land one foot deep. It is equal to 43,560 cubic feet.* One cubic foot per second flowing for twenty-four hours would amount to 86,400 cubic feet. This is nearly two acre-feet. There are 87,120 cubic feet in two acre-feet. The term "acre-foot" is used to give the

*An English or U. S. acre = 43,560 sq. ft.

capacity or volume of large reservoirs, and in giving the amount of water applied to land during an irrigation season.

§ 90. The Inch as Applied to Measuring Water.

THE INCH, OR MINER'S INCH, is a variable quantity, and therefore an unsatisfactory unit. In Colorado the statute defines an inch as follows:

"Every inch shall be considered equal to an inch square orifice under a five-inch pressure, and a five-inch pressure shall be from the top of the orifice of the box put into the banks of the ditch, to the surface of the water." (70)

Under this definition 38.4 statutory inches per second would equal one cubic foot per second, as calculated by E. S. Nettleton, formerly state engineer of Colorado, by using a formula for the discharge of water through an orifice. The orifice used in the calculation was one inch wide by six inches high with a pressure of five inches above the top of the opening.

In Idaho the statute defines an inch as follows:

"The amount of water that will flow through an orifice one inch square with a four-inch pressure above the center of the orifice." (70*a*)

Trautwine says:

"The miner's inch is a unit of rate of discharge of water largely used in the Western mining states. It is expressed in terms of a standard orifice usually one inch square and vertical and a standard head. The head varies from about three inches to nine inches, but six inches is a commonly accepted standard." (71)

In North Dakota the statute provides that "the miner's inch shall be regarded as one-fiftieth of a cubic foot per second in all cases except when some other equivalent of the cubic foot per second has been specially stated by contract, or has been established by actual measurement or use." (72)

The term inch is often confounded with other

(70) 2 Mills' Ann. Stat., §4643.
(70*a*) L. 1899, p. 380, §1.
(71) Trautwine's "Engineers' Pocket Book."
(72) Rev. Codes '05, §7650.

kinds of inches. It is sometimes used to refer to a square inch of water flowing over a weir or in an open channel without reference to the velocity, and hence without reference to quantity. Thus, a channel having a cross-section of one square foot would be spoken of as 144 inches without regard to whether the velocity is one foot per second, two feet per second, or any other number of second feet.

Under the statutory definitions of the inch the amount of water discharged can be varied greatly and still conform to the statutes. An orifice with thin edges will discharge a different quantity than one with thick edges. A square orifice with sides two inches each, having an area of four square inches, will discharge more than four times as much as an orifice one inch square, both having the same pressure above the top of the opening. An orifice one inch high and two inches long will discharge more than twice as much as an orifice one inch square, and less than half as much as an orifice two inches square, and all having the same pressure above the top of the orifice.

As shown above, the inch is such a variable quantity and the term has so many meanings that its use is to be avoided, as far as possible, as a unit for the measurement of water.

§ 91. Flow of Water.

Water does not flow with a uniform velocity through all portions of the channel. This action is due to the friction along the sides and bottom. In channels of uniform cross-section the velocity is greater at the center than at the sides. This fact can easily be shown by placing several floats in the water at equal distances apart across the channel and observing that the float in the center of the channel travels faster than the floats near the side. The velocity is also greater near the surface than at the bottom. These conditions exist under the most favorable circumstances, and the result is a current that is not uniform in velocity. If the current is obstructed by rocks, weeds, sticks of wood or other obstructions, it complicates the situation, causing cross-currents

and eddies, and renders the measurement uncertain as to accuracy. In all measurements of water it is important to have a straight channel of uniform cross-section and free from obstructions of any character.

§ 92. Methods of Measuring.

1st. By Float.—An approximate way of obtaining the discharge of water in a ditch or in any open channel is by the float method. It is important to select a straight channel having a uniform cross-section. (73) Obtain the velocity by floating a chip over a known distance. Divide the distance in feet by the number of seconds it took the chip to travel the distance, and the result will be the surface velocity in feet per second. If the cross-section is taken in a dirt ditch or an earthen channel, deduct 20 per cent. from the surface velocity and the result will give the average velocity. If the cross-section is taken in a wooden flume, deduct 10 per cent. from the surface velocity and the result will be more accurate. The area of the cross-section multiplied by the average velocity will give the discharge in cubic feet per second. This method is only approximate, and should never be used where more accurate methods can be employed. At times some of the results obtained by the float method agree very closely with the correct discharge, and at other times there is a wide difference. The results cannot always be relied upon.

2nd. By Current Meter.—The current meter is an instrument used to obtain the velocity of water. It requires a person skilled in its use to obtain satisfactory results. This method is employed to measure the discharge of running streams and large canals. Under proper conditions results can be obtained with an accuracy within one per cent.

3rd. By Computation.—To determine the discharge of a ditch, canal or other water channel it is necessary to know the dimensions of a cross-section of the canal or stream and its area, also the

(73) A section of the ditch at right angles to its length.

grade and the value of "n," the "co-efficient of roughness," (74) as it is called.

There are several formulas for computing the discharge of ditches, canals and other water channels. The formula in most general use is known as Kutter's. This formula was deduced in 1869 by two Swiss engineers, Ganguillet and Kutter, from a great number of gagings of water channels of different kinds. It is favored by engineers because of its wide application. It can be applied to all ordinary conditions. The flow of water in ditches, canals and other water channels is retarded by contact with the bottom and sides of the channel, and is governed by their roughness. Hence, the capacity of a canal of a given grade and sectional dimensions and area depends upon the smoothness of the surface of its sides and bottom. The Kutter formula recognizes the roughness of such surface and uses the term "n" to express the amount of the roughness. An intelligent use of this formula is based upon a knowledge of the value of "n" to be used. (75) This knowledge is obtained by study and personal experience. Notwithstanding Kutter's rule is purely an empirical formula, it is regarded as of great value.

4th. By Weirs.—The term "weir" was originally used to designate a dam across a stream. In the measurement of water the term is used to describe any structure placed in the channel of a stream which causes the water to flow over a sharp crest with con-

(74) Values of "n" used in Kutter's formula for different channels:

	"n"
Sides and bottom of channel lined with well planed timber	.009
Neat cement (also glazed pipes, and very smooth iron pipes.)	.010
Unplaned timber (also ordinary iron pipes)	.012
Ashlar or brick work	.013
Rubble	.017
Canals in very firm gravel	.020
Canals of fairly uniform cross-section and free from stones and weeds	.025
Canals having stones and weeds occasionally	.030
Canals in bad order	.035

(75) Kutter's formula is mentioned and discussed in Water Sup. & Stor. Co. v. Larimer & Weld Irr. Co., 24 Colo. 322, 51 P. 496 ('97).

siderable fall. The volume of water passing is determined by measuring the depth of the water on the crest.

Numerous experiments have shown that certain kinds of weirs give very accurate results. The use of the weir is generally confined to the measurement of comparatively small volumes, owing to the difficulty of securing proper conditions for large weirs.

Weirs that are used for the measurement of water can be divided into two general classes:

First, weirs without end contractions. This class of weirs is known as "suppressed weirs," as the end contractions are suppressed. In the suppressed weir the length of the crest is equal to the width of the channel of approach

A submerged weir is one in which the water on the down-stream side rises to a higher level than the crest of the weir.

Second, weirs with side contractions. In this class of weirs the length of the crest of the weir is less than the width of the channel of approach. Weirs with contractions may be divided into two classes, rectangular and trapezoidal. Rectangular weirs have the opening through which the water passes in the shape of a rectangle. The term "trapezoidal weir" is generally used to designate a weir designed by an Italian engineer named Cippoletti. It can also be applied to any weir having a trapezoidal shape. In the Cippoletti weir the actual length of the crest of the weir is the effective length, and no corrections are applied for end contractions, as in the rectangular weir. In the Cippoletti weir the sides have a slope of one-fourth horizontal to one vertical, and this automatically allows for the end contractions by increasing the discharge area with each increase in depth. The constant in the formula for discharge of Cippoletti weirs is one per cent. greater than the constant in the rectangular weir formula. The Cippoletti weir is the one most generally used.

The conditions which should surround a weir are given in most standard works on hydraulics. If

accurate results are to be obtained they must be carefully followed. See Merriman's "Hydraulics," Trautwine's 'Engineer's Pocket Book."

CHAPTER 15.

FIXING WATER RATES.

§ 93. Necessity for the Law.

Throughout the arid and semi-arid West provision is made by statute for the appropriation of water for "sale" or "rent," as it is called in the various statutes and decisions, (76) although recent students of the irrigation systems are taking exception to the use of those terms. (77) Under these statutes an incorporated company, association of persons, or even an individual may divert and appropriate the water of a natural stream and convey it through the ditch, canal or other diverting or storage works, to the place of use, and there, in return for a reasonable compensation, deliver the water to the consumer for his beneficial use. The relation between carrier and consumer will be discussed under another title. (78) It is the purpose of these statutes to enable the appropriator or consumer to acquire a valid right to use the water, through the agency of the owner of the canal or ditch, and the statutes authorize such owner to make a reasonable annual carriage charge frequently but inaccurately termed "rental," (79) for delivering the water to the appropriator or consumer under the ditch. Without any restrictions this right to exact an annual tribute would give such owner a great

(76) So. Boulder & Rock Creek D. Co. v. Marfell, 15 Colo. 302, 25 P. 504 ('90); Gutheil P. I. Co. v. Montclair, 32 Colo. 420, 76 P. 1050 ('04); Lanning v. Osborne [Cal.], 76 Fed. 319 ('96); Souther v. San Diego Flume Co., 112 Fed. 228 ('01); 121 Fed. 347 ('03); Wilterding v. Green, 4 Ida. 773, 45 P. 134 ('96); Bardsley v. Boise City Irr. & L. Co., 8 Ida. 155, 67 P. 428 ('01); Boise City Irr. & L. Co. v. Clarke, 131 Fed. 415 ('04); Farmers' Irr. Dist. v. Frank, — Neb. —, 100 N. W. 286 ('04).

(77) Statutes of states and territories, *post*, Part X.

(78) *Post*, §118.

(79) Cases cited in note 76.

power over the consumer which could be exercised so unjustly as to oppress those who were dependent upon the canal or ditch for their only means of producing crops or otherwise making beneficial use of the water. All of these states and territories, therefore, have by law protected the consumer, and, as we shall see, (80) provided a method of fixing rates whenever the consumer feels that he is being unjustly treated.

§ 94. Constitution and Common Law.

The constitution of the state of Colorado (81) forbids the enforcement of unreasonable rates or conditions of time and payment by persons or corporations engaged in carrying water for hire. It also provides that the legislature shall, by law, authorize the board of county commissioners in their respective counties, when application is made to them by either party interested, to establish reasonable rates "for the use of water." (82) Individuals and corporations engaged in carrying water for an annual carriage fee are held to be common carriers or *quasi*-common carriers or public agents. (83) This constitutional provision is but a recognition of a common-law principle, that the individual or corporation who undertakes to perform a public or *quasi*-public duty for hire, must do so in a reasonable manner. (84)

(80) *Post*, §§94-97.

(81) Art. 16, §8.

(82) The term, "the use of water," is often incorrectly used to imply that the charge made by the carrier is for the use of the water itself, whereas it is in reality a charge for the carriage of the water, or in other words, the use of the ditch and right of way of the canal company by the consumer to carry his water. See Wheeler v. Northern Colo. Irr. Co., 10 Colo. 582, at p. 588 ('87), 17 P. 487.

(83) Wheeler v. Northern Colo. Irr. Co., 10 Colo. 582, 589, 17 P. 487 ('87); Merrill v. Southside Irr. Co., 112 Cal. 426, 44 P. 720 ('96); Wilterding v. Green, 5 Ida. 773, 45 P. 134 ('96); Western Irr. Co. v. Chapman, 8 Kan. App. 778, 59 P. 1098 ('99); Slosser v. Salt Riv. C. Co., 7 Ariz. 376, 65 P. 332 ('01); Gould v. Maricopa C. Co., — Ariz. —, 76 P. 598 ('04).

(84) Wheeler v. Northern Colo. Irr. Co., 10 Colo. 582, at 590, 17 P. 487 ('87); Munn v. People, 94 U. S. 113 ('76); C. & N. W. R. R. Co. v. People, 56 Ill. 365; Vincent v. Chicago & Alton R. R. Co., 49 Ill. 33; Price v. Riverside L. L. Co., 56 Cal. 431 ('80).

"The carrier is at least a *quasi*-public servant or agent. It is not the attitude of a private individual contracting for the sale or use of his private property. It exists largely for the benefit of others; being engaged in the business of transporting, for hire, water owned by the public, to the people owning the right to its use." (85)

Therefore, no constitutional provision is necessary to enable the courts to protect the consumer and to establish reasonable rules relating to the charge for carriage and the time and manner of its collection. (86)

§ 95. Rate Fixing and "Anti-Royalty Act"—Public Service Corporations.

By the act of 1879, as amended, (87) it is provided that the county commissioners shall, at their January meeting, hear and consider all applications which may be made by any party or parties interested in procuring water for irrigation by "purchase" from any ditch or reservoir "furnishing or selling" water, etc., and that the board shall fix a time within the periods prescribed by the statute, when they will hear the testimony of the parties. The board is given as full power as the district court has to subpœna witnesses and to compel their attendance, and also to compel the production of books and papers required for evidence. In reaching its conclusions it must examine into the "value" of the construction of such ditch or reservoir, the cost of maintaining and operating same, and fix a price at which water shall be sold; which price shall not be changed oftener than once in two years. The act also provides that those who have used water from such ditch or canal and shall not have ceased doing so with the intent to obtain water from some other source of supply, shall have the right to continue "purchasing the water" to the same amount upon tender of the price fixed by the board, and if no such price has been fixed, then

(85) Wheeler v. Northern Colo. Irr. Co., 10 Colo. 582, 589, 17 P. 487 ('87).
(86) *Id.*
(87) Colo. 1 Mills' Ann. Stat., §§2295-2303.

at the price at which others are procuring the water, or at which water was "sold" the last preceding year. By the Colorado act of 1887 (88) known as the "Anti-Royalty Act," it is made unlawful for any person owning or controlling any ditch, canal or reservoir to demand, accept or receive as royalty, bonus or premium, prerequisite or condition precedent to the right or privilege of applying or bargaining for or procuring such water. A penalty of fine and imprisonment is provided for the collecting of excessive rates and refusing to deliver water, and it is also provided that, for a refusal by a corporation to deliver water after proper demand and tender has been made, the attorney general, upon the request of the county commissioners of the proper county, or upon his otherwise receiving due notice thereof, shall institute and prosecute proceedings in *quo warranto* for the forfeiture of the corporate rights and privileges of such corporation. This enactment, as stated above, is locally known as the "Anti-Royalty Act." These statutes are not the outgrowth of the doctrine of appropriation, but follow the general principles relating to corporations performing a public duty or service or impressed with a public trust, such as supplying citizens with gas and water and transportation and communication facilities, including steam railways and telephone service. Statutes relating to rates charged for service by these various classes of corporations have been attacked as unconstitutional, and almost invariably sustained by the state and federal courts. (89)

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(88) 1 Mills' Ann. Stat., §§2304-2309.

(89) Corporations furnishing gas—State v. Cincinnati Gas L. Co., 18 Ohio St. 262 ('68); Chicago Gas L. Co. v. People's Gas L. Co., 121 Ill. 530, 13 N. E. 169 ('87); Gibbs v. Balt. Gas Co., 130 U. S. 396, 9 Sup. Ct. Rep. 553 ('89); People v. Chicago Gas Trust, 130 Ill. 268, 22 N. E. 798 ('89). Corporations furnishing or carrying water—County of San Francisco v. Spring Val. W. Co., 48 Cal. 493 ('74); Spring Val. Water Works v. City of San Francisco, 82 Cal. 286, 22 P. 910, 1046 ('90); San Diego W. Co. v. City of San Diego, 118 Cal. 556, 50 P. 633 ('97); City of Indianapolis v. Navin, 151 Ind. 139, 47 N. E. 525 ('97); City of Danville v. Water Co., 178 Ill. 299, 53 N. E. 118 ('99); *Id.*, 180 Ill. 235, 54 N. E. 224 ('99); Freeport Water Co. v. City of Freeport, 187

The United States supreme court, in the case of Spring Valley Water Works v. Schottler, (90) held that laws requiring gas companies, water companies, and other corporations of like charatcer to supply their customers at prices fixed by the municipal authorities of the locality, are within the scope of legislative power unless prohibited by constitutional limitation or valid obligation.

A case is now pending in the supreme court of Nebraska wherein the carrier claims that, because its articles of incorporation provide that it shall have the power "to sell water rights," it may cease "renting" the use of the water, and sell permanent rights. The minority stockholders contend that such a course would soon dispose of all of the property of the corporation and put it out of business. The trial court dissolved the temporary injunction issued at the request of the minority stockholders. It would seem as though such a corporation would have the right to dispose of permanent rights to run water through its canal, although a corporation does not possess all of the powers it claims or sets out in its charter. (91) The decisions interpreting the statutes relating to carriers of water for irrigation will be presented and discussed in the ensuing sections.

Ill. 179, 57 N. E. 862 ('00); Santa Ana Water Co. v. Town of San Buena Ventura, 65 Fed. 323 ('95); Spring Val. Water Works v. Schottler, 110 U. S. 347, 4 Sup. Ct. 48 ('83). Corporations furnishing steam facilities—Ill. Central R. Co. v. People, 95 Ill. 313 ('80); Ames v. Union Pac. R. R. Co., 64 Fed. 165, 167 ('94); Atty. Gen'l v. C. & N. W. R. R. Co., "Granger case," 35 Wis. 425 ('74); Ore. R. R. v. Ore. R. R., 130 U. S. 1, 9 Sup. Ct. Rep. 409 ('89); Chicago, M. & St. P. R. R. v. Minn., 134 U. S. 418, 10 Sup. Ct. Rep. 462 ('90); Chicago R. R. Co. v. Wellman, 143 U. S. 339, 12 Sup. Ct. 400 ('92); Regan v. Trust Co., 154 U. S. 362, 399, 14 Sup. Ct. 1060 ('93); Johnson v. Atlantic Trans. Co., 156 U. S. 618, 15 Sup. Ct. 520 ('95); Lake Shore R. R. v. Smith, 173 U. S. 684, 19 Sup. Ct. 565 ('99); Chicago & Milwaukee R. Co. v. Tompkins, 176 U. S. 167, 20 Sup. Ct. Rep. 336 ('00). Corporations furnishing telephone service—State v. Citizens' Tel. Co., — So. Car. —, 39 S. E. 257 ('01); City of St. Louis v. Bell Tel. Co., 96 Mo. 623, 10 S. W. 197 ('88).

(90) 110 U. S. 347 ('83).

(91) Oregon R. R. Co. v. Oregon R. R. Co., 130 U. S. 1, 9 Sup. Ct. Rep. 409 ('89).

§ 96. Rate Fixing in Colorado—"Royalties"—Confiscatory Rates.

The Colorado act of 1879 as to fixing water rates, (92) was attacked as to its constitutionality, and the supreme court of Colorado, in sustaining it, in the case of Golden Canal Co. v. Bright, (93) in effect said: If the persons and corporations engaged in carrying water to the farmers along the lines of their canals and ditches were entirely uncontrolled in the matter of prices, injustice and trouble would follow. The court further held that it was exceedingly proper that they should be subject to reasonable regulations as provided in Art. 16, §8, of the constitution, that the price to be paid for water was involved in the act regulating its use, and the fixing of maximum water rates was sufficiently expressed in the title of the act of 1879, and it was sufficient to authorize the rate fixing sections 1 and 2 thereof. (94)

Under the constitution the county commissioners can only be authorized to establish the *maximum* amount of the rate charged by "carriers of water." (95) They cannot be empowered to dictate the exact rate that shall be collected, or to fix the time and conditions of payment. The time and conditions of payment are proper subjects for legislation. The constitution provides for the tribunal to fix the maximum rate, and when so acting the board of county commissioners are a judicial or *quasi*-judicial tribunal. (96) The action of the county commissioners in fixing the rate does not affect existing contracts between carrier and consumer, (97) but a contract which provides that in consideration of $1.00 and the further payment of an "annual rental" of $150, the carrier promises to deliver to the consumer "100 inches" of water, etc., is not such a contract as is saved from invasion by the statute. It is noth-

(92) 1 Mills' Ann. Stat., §§2295-2303, *post*, §§501-509.
(93) 8 Colo. 144, 6 P. 142 ('84).
(94) 1 Mills' Ann. Stat., §§2295, 2296, *post*, §§501-502.
(95) *Post*, §390.
(96) Wheeler v. Northern Colo. Irr. Co., 10 Colo. 582, 17 P. 487 ('87).
(97) 1 Mills' Ann. Stat., §2296, *post*, §502.

ing more than an option, and is canceled any irrigating season by the failure of the consumer to pay the "annual rental" specified in such contract. (98) It would seem that the question of whether or not an existing contract is affected by the action of the county board in fixing rates would have to be determined from the facts of each particular case, and that the general rules relating to the construction of contracts would apply.

"If the promisor gets nothing in return for his promise, but that to which he is already legally entitled, the consideration is unreal and does not support the promise." (99)

"If a man is under a public duty to perform an act, his performance of it or his promise to do it furnishes no consideration for a promise given in return." (99)

These two general principles apply to many of the usual contracts made by carriers with their consumers, relating to what is termed the "rental" (99*a*) of water. The "Anti-Royalty Act" of Colorado (100) expressly prohibits the carrier from demanding, bargaining for or receiving, either directly or indirectly, as royalty, *bonus* or premium prerequisite or condition precedent to the right or privilege of applying or bargaining for or procuring water. (101) In the

(98) South Boulder & R. C. D. Co. v. Marfell, 15 Colo. 302, at p. 307, 25 P. 504 ('90). In this case the appellees had entered into contracts with the appellant ditch company, whereby it was provided that in consideration of $1.00 and an annual payment of various sums based upon a rate of $1.50 per inch, the ditch company agreed to deliver to the consumers the amount of water named in the respective contracts. Subsequently, certain of the consumers, including these appellees, applied to the county commissioners and had the annual carriage rate fixed at $1.00 per inch, and thereupon tendered that amount instead of the rate fixed by the contract. The contract also provided that upon a failure to pay the annual delivery charge specified, the consumer "forfeits and relinquishes all rights and claims whatsoever, both against the said company and in and to the use of said water from said ditch." In addition to the holding set forth in the text the court held that the clause relating to forfeiture and relinquishment merely applied to such rights as the contract itself conferred, and not to the rights conferred by the constitution and statutes.

(99) Hammond "On Contracts," §§330-1, citing cases.

(99*a*) *Post*, §117.

(100) See *ante*, §95.

(101) 1 Mills' Ann. Stat., §2304, *post*. §510.

case of Wheeler v. Northern Colo. Irr. Co., (102) the carrier had required the consumer to "buy in advance the right to receive and use water," and to pay therefor the sum of $10 per acre. Also that he pay annually, in the way of a carriage rate, not less than $1.50 nor more than $4.00 per acre, "as may be established from year to year," by the carrier. Dr. Wheeler, the consumer, applied for a mandamus to compel the defendant company to furnish water for his lands without paying the $10 per acre royalty, as a condition precedent to his right to have the water furnished upon the payment of the annual carriage rate. The trial court sustained a demurrer to the alternative writ and the supreme court in reviewing this ruling reversed the case. It was argued for the company that the sum of $10 per acre was in reality a part of the carriage fee of $1.00 per acre for ten years, which the company elected to collect in advance. Two opinions were filed, one of them by Helm, J., being very elaborate and comprehensive. After holding that this $10 advance payment was nothing but a royalty, Helm, J., said:

"If the carrier may collect a *part* of its annual transportation charge in advance for the remaining years of its corporate life, it may collect *all*. Suppose the company just organized, under counsel's view the consumer may, there being no legislation on the subject, be compelled to pay the cost of delivering water to him for the entire twenty years of its existence, before he can exercise his constitutional right during a single season. * * * He may not want the water for twenty years, or it may be utterly impossible for him to advance so large a sum at once. * * * The carrier must be regarded as an intermediate agency existing for the purpose of aiding consumers in the exercise of their constitutional right, as well as a private enterprise prosecuted for the benefit of its owners. Yet, if such exactions as the one we are now considering are legal, the carrier might, at its option, in the absence of legislation, effectuate or defeat the exercise of this right;

(102) 10 Colo. 582, 591, 17 P. 487 ('87).

and we would have a constitutional provision conferring an affirmative right, subject for its efficacy in a given section to the greed or caprice of a single individual or corporation. * * * Respondent cannot collect of relator the sum of $10, or any other sum, for the privilege of exercising his constitutional right to use the water."

The same contract was construed again in the case of Richards v. Northern Colo. Irr. Co. (103) and it was again held to be an unlawful demand of a royalty. It is not necessary that all consumers using or seeking water from a particular ditch should join in an application to the county commissioners to fix the maximum price of the water, nor is it necessary that the applicant or petitioner be a person who has theretofore used water from such canal, ditch or reservoir, if the carrier has any surplus water uncontracted for. (104) The supreme court in the case of Golden Canal Co. v. Bright, (105) held that there was no appeal under the statute from the decision of the county commissioners fixing the rate. This question was mentioned in the case of South Boulder & Rock Creek Ditch Co. v. Marfell, (106) but not decided. It would seem, however, that even though no statutory provision is made for an appeal from an order of the board of county commissioners, nevertheless if the rates fixed were confiscatory, certiorari would probably lie to secure a review, or relief could likely be obtained in equity from an order that was manifestly unjust, and amounted practically to a confiscation of the carrier's property. (107) Under the title of "Remedies, Pleading and Practice" will be discussed

(103) 22 Colo. 450, 45 P. 423 ('96). Royalty exactions are also frowned upon in San Diego Land & Town Co. v. City of National City, 74 Fed. 79, 86 ('96, Cal.); Lanning v. Osborne, 76 Fed. 319, 325, 329 ('96, Cal.). These cases are referred to, *post*, §97.

(104) South Boulder, etc., Co. v. Marfell, 15 Colo. 302, 25 P. 504 ('90).

(105) *Supra*, note No. 93.

(106) *Supra*, note No. 98.

(107) It is the present value—that is, the value at the time of fixing the rates—and not the cost, that must be taken as the basis upon which to fix reasonable and just rates, and "every intendment is in favor of the rates as established by the municipal authorities." San Diego Land & Town Co. v. City of National City [Cal.], 74 Fed. 79, 83-4 ('96).

the manner in which the order of the board of commissioners as to rates, and the right to receive water under the statute, is enforced. (108)

§ 97. Fixing Rates in Other Arid States—Reasonableness—Anti-Royalties.

From the nature of the business of transporting water, ditch companies rarely have competition. The farmers along the line of their canals are largely dependent upon them for their supply of water. (109) By constitution in California a blow was struck at water company monopolies by declaring the distribution of water a public use. (110) Probably all of the arid and semi-arid states and territories have provided by statute for the protection of the consumer from extortion at the hands of the carrier, and the fixing of reasonable and equitable maximum rates to be charged by the latter for the carriage of the water. The California constitution also provides for the fixing of the rates for supplying water to any city, county or town, or the inhabitants thereof, by the governing board of the city, county or town. (111)

It was there held that a foreign corporation, acquiring water rights under the laws of the state, would not be permitted to attack these constitutional provisions on the ground that they are contrary to the federal constitution. Such a corporation may, however, question the reasonableness of the rates established. (112) In exercising these powers, the question of the reasonableness of the rates is primarily one for the determination of the board, and the courts are not authorized to interfere unless the rates are so plainly and palpably unreasonable as to make their enforcement equivalent to the taking of private property without just compensation. (113) The

(108) *Post*, §154.
(109) *Post*, §116; *ante*, §42.
(110) Const. Cal., Art. 15, §1; Merrill v. Southside Irr. Co., — Cal. —, 44 P. 720 ('96).
(111) Const. Cal., Art. 14, §1.
(112) San Diego Land & Town Co. v. City of National City, 79 Fed. 79 ('96).
(113) San Diego Land & Town Co. v. Jasper, 110 Fed. 702 ('01), affirmed 189 U. S. 439, 23 Sup. Ct. 571; San Diego Water Co. v. City of San Diego, 118 Cal. 556, 50 P. 633 ('97).

California act of 1885 does not make the cost of the plant used in appropriating and furnishing water the test of the value for the purpose of fixing rates, but requires such rates to be based upon its actual value at the time of the hearing, and if it appears that the board made no allowance for the deterioration of the plant, that fact does not authorize a court to declare the rates fixed by the board unreasonable, although the deterioration of the plant should properly be taken into consideration. (114) If the rates fixed by the board for the sale, rental or distribution of water appropriated for such purposes, be unreasonable, the court will annul the rate, but will not establish a new one. The question must be remitted to the board, and the new rate ascertained and established as in a new proceeding. (115) Where the proper board, acting under the act of 1885, has not established the rates, the carrier may make valid contracts with its consumers for the furnishing of water, (116) and the carrier may raise such rates where no attempt has been made by the board to fix them. (117) Where a carrier has made valid contracts with the consumers, prior to the fixing of the rates by the board, the rights of the parties are governed by the contracts and are not affected by the subsequent action of the board. (118) By the California statute it is also provided as in Colorado, that the consumer, who has used water

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(114) *Id.* See, also, Lanning v. Osborne, 76 Fed. 319 ('96).
(115) Lanning v. Osborne, 76 Fed. 319 ('96).
(116) San Diego Flume Co. v. Souther, 90 Fed. 164 ('98).
(117) Osborne v. San Diego Land & Town Co. of Maine, 20 Sup. Ct. 860, 178 U. S. 22 ('00).
(118) Souther v. San Diego F. Co., 112 Fed. 228 ('01), 121 Fed. 347 ('03). In this case the contract provided for a stipulated quantity of water, but contained a proviso that the company should not be liable for a failure to supply such quantity, if the failure was caused by drouth or other causes beyond its control. Held, that the contract should not be narrowly construed, and in case of drouth the company was entitled to distribute the water ratably among all its consumers. Where, however, the supposed contract is not a contract, but merely an option, it is not binding on either party in such a way as to prevent either party from taking advantage of the rates fixed by the board of county commissioners or from petitioning the board to fix the rates. See the Marfell case, *ante*, §96.

from a common carrier is entitled to continue such use. In a case where the carrier undertook to deprive such a consumer of his right and to supply late comers because, by reason of more favorable conditions, a larger area could be irrigated, it was held that the first consumer was entitled to his prior rights under the statute; that the fact of his signing a contract for five years at a higher rental than that fixed by the board and expressly waiving his rights under the statute did not deprive him of his right to continue using the water after the contract had expired, nor entitle the company to demand a renewal of the contract as a prerequisite to his securing the water. (119) Idaho has adopted practically the entire Colorado law relating to the delivery of water by carriers and the fixing of rates by the commissioners, (120) Prior to the adoption of this law the district court fixed reasonable rates. (121) A company, organized for conveying and selling or renting water under this law, has no authority to make a distinction between its consumers, and while supplying some with water under private agreement at low rates, attack the validity of the maximum rates fixed by the county commissioners under the statute on the ground that the rates so fixed will not yield a reasonable return on its investment, but will amount to a taking of property without compensation. (122) In determining the reasonableness of the rates charged by a carrier they must be considered as applicable to all its consumers. Such a rate is not unconstitutional as depriving the company of its property without compensation because it will not produce a revenue above expenses to pay a reasonable income on the money invested, where the plant was constructed on a larger scale and at a greater expense than was necessary to supply its present customers, and intended to sup-

(119) San Diego Land & Town Co. v. Sharp, 97 Fed. 394 ('99).
(120) Act 1899, 2 Idaho Code, § 2599 *et seq.*; *post*, §§ 867, 935-939.
(121) Wilterding v. Green, 4 Ida. 773, 45 P. 134 ('96).
(122) Boise City Irr. & L. Co. v. Clark *et al.* Co. Com. [Ida.], 131 Fed. 415 ('04).

ply a greater number than it has yet obtained. (123) As in Colorado, (124) royalties nor any other charge can not be made or collected as a condition precedent to the delivery of the water upon the payment of the annual carriage fee. (125) Under the recent codes, as well as under some of the older statutes of the other semi-arid states and territories, provisions similar to those of California, Colorado and Idaho furnish protection to the consumer from the extortionate demands of those engaged in carrying water "for sale" or "rental." (126) The supreme court of Arizona has rendered three very elaborate opinions discussing all of the questions treated in this chapter. (127) The latest of these cases distinctly announces the rule to be that there rests upon a public corporation, so long as it uses its franchise, a duty to render to the public, at a reasonable rate, the services for which it was created; that in the absence of statute the question whether rates which have been charged are unreasonable is a proper subject for judicial inquiry, (128) and upon the question as to the right of the court to fix the rate the court said:

"Appellant contends that the fixing of a rate for the rendition of services by a public corporation is a legislative act, and not judicial. It is necessary to apply a distinction which we may accurately make by adopting the language of the supreme court of the United States, in Interstate Commerce Com. v. Cincinnati, etc., R. R. Co., (129) 'It is one thing to inquire whether the rates which have been charged and collected are reasonable—that is a judicial act; but an

(123) Boise City Irr. & L. Co. v. Clark *et al.* Co. Com. [Ida.], 131 Fed. 415 ('04).

(124) *Ante*, §95.

(125) San Diego Land & Town Co. v. City of National City [Cal.], 74 Fed. 79, 86 ('96); Lanning v. Osborne [Cal.], 76 Fed. 319, 325, 329 ('96).

(126) Western Irr. Co. v. Chapman, 8 Kan. App. 778, 59 P. 1098 ('99).

(127) Slosser v. Salt River C. Co., 7 Ariz. 376, 65 P. 332 ('01); Gould v. Maricopa C. Co., — Ariz. —, 76 P. 598 ('04); Salt River Val. C. Co. v. Nelssen, — Ariz. —, 85 P. 117 ('06).

(128) For cases supporting this doctrine, see 48 Cent. Dig. §312.

(129) 167 U. S. 479, 17 Sup. Ct. 896 ('96).

entirely different thing to prescribe rates which shall be charged in the future—that is a legislative act.' The court did not seek to fix a rate for future service by appellant, but exercised jurisdiction to determine whether the rate was unreasonably high which had been collected by appellant from Nelssen for service of water pending a final hearing, which rate was paid by Nelssen under an order of the court, and, therefore, presumably without acquiescence in the amount." (130)

CHAPTER 16.

INCORPORATED IRRIGATION DISTRICTS—THE "WRIGHT ACT."

§ 98. Origin of "Wright Act."

The magnitude of many irrigation enterprises places them beyond the ability of individuals as well as of the average corporation. Experience has also taught that with each irrigator or carrying company working separately and for their respective interests, the best results are not obtained. These and other reasons led to the adoption in California in 1887 of what is known as the "Wright Act." (131) After a number of amendments the original act was repealed and in 1897 an entirely new act, was adopted. (132) The California act, but slightly modified in the main, has been adopted in the following states: Colorado, (133) Idaho, (134) Kansas, (135) Nebraska, (136) Nevada, (137) and Washington. (138) In 1888 Utah adopted the "Wright Act," but it was repealed by the Revised Statutes of 1898. It was

(130) Salt River Valley C. Co. v. Nelssen, — Ariz. —, 85 P. 117 ('06). In this case a temporary mandatory injunction was issued. See *post*, §155.
(131) Laws 1887, p. 29.
(132) Laws '97, p. 254; Gen. Laws '99, pp. 436-548.
(133) Laws '05, p. 246; *post*, §516
(134) Laws '03, p. 150.
(135) Gen. Stat. '05, §§3863-3886.
(136) Comp. Stat. '05, §§6476-6542.
(137) Comp. Laws '00, §§374-423.
(138) Pierce's Code '05, §§5736-5814.

provided, however, that the repeal should not affect existing districts. (139) The California act being the model for the acts in other states, this chapter will be based principally upon the California decisions. Indeed there are but few decisions upon this subject elsewhere, but such as there are will also appear in the following sections. A form of organization and aid akin to the "Wright Act" has been applied in South Dakota to the promotion of artesian well-boring for irrigation purposes. (140)

§ 99. Procedure for Organizing District.

An irrigation district is started by the people. A majority of the owners, representing also a majority in value of the lands susceptible of irrigation from the same source and by the same diverting system, may petition the board of supervisors of the county in which the lands within the contemplated district or a greater portion of them are situated, to organize an irrigation district. (141) The petition must be accompanied by a bond to be approved by the board, conditioned for the payment of all costs, should the organization of the district not be effected. A day is to be fixed by the board for a hearing, and if the petition complies with all the requirements of the statute, an election is ordered to determine whether the district shall be organized and to elect its board of directors and other officers. This election is conducted as nearly as possible along the lines of a general election, and the qualifications of the electors vary in each state. (142) In California at least two-

(139) Rev. Stat. '98, §§1287, 1288; Laws 1905, p. 165, §71.
(140) See *ante*, §38.
(141) In Colorado the signers must be resident electors, who have in the preceding year paid a property tax in the proposed district. In Idaho and Washington the petition must be signed by "fifty, or a majority, of the holders of title or evidence of title," and must represent at least one-fourth of the total area of land in said district, which will be assessable for the purposes of the district. In Kansas the petition must be signed by three-fifths of the resident landowners. In Nebraska there must be a majority of the electors of the proposed district who are freeholders. In Nevada, a majority of the taxpayers owning lands within the proposed district, is required.
(142) See state and territorial statutes, *post*, Part X.

thirds of all votes cast are necessary to declare the district organized, (143) and the persons receiving the highest number of votes are duly elected as its officers. The validity of such an election may be contested, (144) but in all such contests the provisions of the law relating to the formation of irrigation districts are to be liberally construed. (145) The boundaries of the proposed district must be set forth in the petition. This provision is complied with by a description that would be sufficient in a deed, (146) or such as would be necessary in an act of the legislature creating a political district or municipal corporation. (147) Upon the hearing of the petition the board has the power to change the proposed boundaries of the district within certain limits in any way it deems advisable, but the final order must define and establish such boundaries. The board cannot exclude lands which can be irrigated from the common source and by the same system, nor can lands which can not be benefited be included in such district. It was held in Central Irr. Dist. v. De Lappe, (148) that the decision of the board as to the propriety of excluding lands is final. (149) In all of the states, except Kansas, the act provides that land which "in the judgment of the board cannot be benefited by irrigation from such system, shall not be included within such district."

The California, Colorado, Nebraska and Washington acts contain provisions whereby lands which have been included within an irrigating district may be excluded. This is done by a petition to the board

(143) Colorado requires a majority; Idaho, two-thirds; Kansas, three-fifths; Nebraska, a majority; Nevada, two-thirds; Washington, two-thirds.

(144) Central Irr. Dist. v. De Lappe, 79 Cal. 351, 21 P. 825 ('89); *In re* Madera Irr. Dist., 92 Cal. 296, 28 P. 272 ('91); *In re* Central Irr. Dist., 117 Cal. 382, 49 P. 354 ('89).

(145) Central Irr. Dist. v. De Lappe, 79 Cal. 351, 21 P. 825 ('89).

(146) *Id.*

(147) *In re* Madera Dist., 92 Cal. 296, 28 P. 272 ('91).

(148) 79 Cal. 351, 21 P. 825 ('89).

(149) See, also, Bd. Directors Modesto Irr. Dist. v. Tregea, 88 Cal. 334, 26 P. 237 ('91); *In re* Madera Irr. Dist., 92 Cal. 296, 28 P. 272, 675 ('91); *post*, §101.

of directors of the district and the publication of a notice of the hearing to be had upon such petition. The board of directors is vested with discretionary power of granting or refusing the petition as it may deem to be for the best interest of the district. If the district has issued bonds before any resolution of the board of directors can operate to exclude land, the holders of the bonds of the district must give their assent in writing, permitting the land to be excluded.(150) These various provisions relating to land which cannot be irrigated and as to the exclusion of lands from the district have been construed by the supreme court of Nebraska. In the first hearing the court held that under no circumstances would a court of equity aid in the exclusion of land until the remedy by statute had first been tried,(151) and upon rehearing it again held that the question of whether a particular tract of land would be benefited by a proposed system of irrigation was exclusively for the county board in establishing and defining the boundaries of such district, and that its decision was conclusive upon the owner of such lands, at least, in a collateral proceeding. The Colorado and Nebraska acts contain the proviso, "That in no case shall any land be held by any district or taxed for irrigation purposes which cannot, from any *natural*(152) cause, be irrigated thereby."(153) Under this proviso the Nebraska court held that the act distinguishes between land which would not be benefited by irrigation and such as from some *natural* cause is nonirrigable. That whether or not land would be benefited is a question confided to the county board, but whether a particular tract of land from some *natural* cause cannot be irrigated is a question which goes to the jurisdiction of the county board over such

(150) The exclusion of land under the provisions of these acts does not affect the validity of the bonds theretofore issued by the district. Herring v. Modesto Irr. Dist. [Cal.], 95 Fed. 705 ('99).

(151) Andrews v. Lillian Irr. Dist., 66 Neb. 458, 92 N. W. 612 ('02), 97 N. W. 336 ('03).

(152) The italics are ours.

(153) Colorado, 3 Mills' Ann. Stat. (2d ed.), §2309s1; Nebraska Comp. Stat. '05, §6525.

tract, and may be raised at any time in a proper case, because this proviso expressly denies the jurisdiction of the county board to include such land in an irrigation district or to tax it for irrigation purposes, and its inclusion within the district would be a violation of a plain provision of the statute. (154) If the bond presented with the petition is informal but not invalid, and is binding upon those who executed it, the determination of the board as to its sufficiency is conclusive. (155) The board has the power to permit a defective bond to be replaced by a new one before acting upon the petition. (156) The inclusion of a town or city within the boundaries of an irrigation district does not invalidate its organization, (157) nor does the fact that public land is included within the district affect the validity of its organization. (158)

§ 100. Powers and Duties of Irrigation Officers.

The board of directors is empowered and the duty is imposed upon it to manage the business affairs of the district, (159) to make all contracts, to appoint or employ all agents, officers or other employees, and to prescribe their duties. They must meet and organize at the time and in the manner provided by statute. They are empowered to enter upon any land to make surveys. They may locate the necessary diverting and carrying works upon any lands deemed by them best for the purpose, and they may acquire such lands, as well as water rights and other necessary property, by purchase or condemnation.

(154) Andrews v. Lillian Irr. Dist., 66 Neb. 458, 97 N. W. 336 ('03).

(155) *In re* Madera Irr. Dist., 92 Cal. 296, 28 P. 272 ('91).

(156) Central Irr. Dist. v. De Lappe, 79 Cal. 351, 21 P. 825 ('89).

(157) Board Directors Modesto Irr. Dist. v. Tregea, 88 Cal. 334, 26 P. 237 ('91); *In re* Madera Irr. Dist., 92 Cal. 296, 28 P. 272, 675 ('91).

(158) Cullen v. Glendora Water Co., 113 Cal. 503, 39 P. 769, ('95); 45 P. 822, 1047 ('96).

(159) Under the Utah act of 1884 it was held that after an irrigation district has been organized, the boundaries determined, and the trustees elected, it became the trustees' duty to assume jurisdiction over the whole district. They could not assume the management of part of the district and reject the other part. Mandamus will lie to compel them to perform their duty. Harris v. Tarbet, 19 Utah 328, 57 P. 33 ('99). See *post*, §154.

But from the wording of the statute it would seem that the irrigation district through its board cannot acquire completed irrigation systems by condemnation, but must do so by purchase. (160) The diverting, storing, carrying or other works of the district are constructed by the board or under its supervision. It is empowered to make and adopt equitable by-laws, rules and regulations for the government of the district and the distribution and use of the water among the landowners, with general power to do all things necessary to carry out the intent and purpose of the act. It may sue and be sued in all matters pertaining to the business affairs of the district. (161) The validity of proceedings for the establishment of an irrigation district cannot be attacked collaterally in a suit to recover possession of land sold for non-payment of district taxes. (162)

§ 101. District Bonds and Levying Assessments.

The statute requires the board of directors to ascertain the probable cost of acquiring the necessary property and of constructing the system to be used in diverting, storing or carrying the water, (163) and then to submit to the electors of the district the question of the issuance of bonds for a sum sufficient to defray all necessary expense. These provisions of the act have been attacked as unconstitutional on the ground that they contemplate unequal taxation or taxation for other than a public purpose. They were sustained, however, as providing for public improvements, and it was held that the secretary of an irrigation district would be compelled by mandamus to sign the bonds for such purpose. (164) Before

(160) See statutes, *post*, Part X.

(161) Boehmer v. Big Rock Irr. Dist., 117 Cal. 19, 48 P. 908 ('97); Hewitt v. San Jacinto & P. V. Irr. Dist., 124 Cal. 186, 56 P. 893 ('99). See Lincoln & Dawson Irr. Dist. v. McNeal, 60 Neb. 613, 83 N. W. 847 ('00).

(162) Purdin v. Wash. Nat. Bldg., L. & Inv. Assn., — Wash. —, 83 P. 723 ('06).

(163) Willow Springs Irr. Dist. v. Wilson, — Neb. —, 104 N. W. 165 ('05).

(164) Turlock Irr. Dist. v. Williams, 76 Cal. 360, 18 P. 379 ('88); Fallbrook Irr. Dist. v. Bradley [Cal.], 17 Sup. Ct. 56, 164 U. S. 112 ('96). See Kinkade v. Witherop, 29 Wash. 10, 69 P. 399 ('02).

submitting the question of issuing bonds to the electors of the district, the directors must have decided upon some definite system of works and have made an estimate therefor. (165) This feature of the law is open to some objection as it provides for no check upon the board of directors, and if the estimate submitted to the people is not correct, no remedy is provided. In making this observation we are not unmindful that there are provisions in the act for the levying of special, also additional assessments, after the question of such a levy has been approved by a majority of the electors of the district, and that the proceeds of such special or additional assessments may be used for completing the construction or purchase of the proposed irrigation system, whenever the funds derived from the sale of the bonds are insufficient or unavailable for such purpose. A case is now pending in the supreme court of Colorado wherein the estimate of the board of directors of the High Line Irrigation District is attacked, and it is contended that, if the proposed issue of bonds is sold, the funds derived therefrom will not complete the proposed system and the landowners of the district will find their lands subject to the lien of such bonds, without deriving the proper benefit from the expenditure of the money. It may be argued that the deficiency can be made up by special or additional assessments; but if the deficiency were large, a special or additional assessment may in time be so large as to be beyond the means of the taxpayers, and amount to confiscation. Again it may be argued that new bonds may be issued for a sum sufficient to take up the old issue and to provide a fund with which to do the additional work, but a careful examination of this suggestion will disclose its weakness. In the first place, the primary issue of bonds may not have reached the age when the district would have the right to pay them, and the holders might not be willing to accept payment out of time and to surrender a good interest-bearing investment. The holders,

(165) Cullen v. Glendora Water Co., 113 Cal. 503, 39 P. 769 ('95), 45 P. 822, 1047 ('96).

moreover, would probably refuse to accept bonds of the new issue in exchange for those of the old, because by the increase in amount the bonds might not be as valuable. Then, again, the financial market might be in such a condition at the time when the second issue was offered as to render a sale difficult if not impossible. Some method, therefore, should be provided by the statute whereby the question of the sufficiency of the estimate made by the board of directors could be examined into, and the true amount fixed as nearly as possible before any definite action is taken toward issuing bonds that become at once a lien upon all the property within the district. The bonds and the interest thereon are paid by revenue derived from an annual assessment upon the real property of the district, all of which is liable to assessment for such purposes. An assessment made and levied for a purpose which has not been submitted to the electors of the district is void, and its collection cannot be enforced. (166) Property that has been legally assessed may be sold for the non-payment of assessments and redeemed from such sale in the manner provided by the statute. (167) An irrigation district organized under the "Wright Act," which continues to exist, is at least a *de facto* municipal corporation and its officers are *de facto* officers, and the legality of its organization cannot be collaterally attacked by an individual or pleaded by the district itself, for the purpose of defeating obligations which it incurred while acting as such *de facto* corporation. (168)

It is within the power of the officers of an irrigation district to use the bonds, instead of the proceeds of a sale thereof, in acquiring or constructing irrigation ditches or canals; and bonds issued in pay-

(166) Tregear v. Owens, 94 Cal. 317, 29 P. 643 ('92); Woodruff v. Perry, 103 Cal. 611, 37 P. 526 ('94).

(167) Fallbrook Irr. Dist. v. Bradley, 17 Sup. Ct. 56, 164 U. S. 112 ('96); Turlock Irr. Dist. v. Williams, 76 Cal. 360, 18 P. 379 ('88); Cooper v. Miller, 113 Cal. 238, 45 P. 325 ('96); Hughson v. Crane, 115 Cal. 404, 47 P. 120 ('96); Lahman v. Hatch, 124 Cal. 1, 56 P. 621 ('99); Perry v. Otay Irr. Dist., 127 Cal. 565, 60 P. 40 ('00); State v. Brown, 19 Wash. 383, 53 P. 548 ('98).

(168) Herring v. Modesto Irr. Dist. [Cal.], 95 Fed. 705 ('99). See, also, Quint v. Hoffman, 103 Cal. 506, 37 P. 514 ('94).

ment for such work or property are issued for a valuable consideration, and in substantial compliance with the act. (169) In case of default in the payment of the principal or interest of such bonds the holder may bring his action after presenting the bonds or coupons to the treasurer of the district, and he need not make demand upon the county treasurer. (170) After securing judgment against the irrigation district upon the bonds or coupons and having a writ of execution against the property of the district returned unsatisfied, the holder of the judgment should compel the officers of the district by mandamus to levy an assessment against the property of the district. (171) An application for the appointment of a receiver will be denied. (172) The fact that lands have been excluded from the district in the manner prescribed by the act, after its organization and the issuance of bonds, does not affect the validity of the bonds and cannot be raised by the district as a defense to such bonds. (173)

§ 102. Bonds—Proceedings to Ascertain Validity.

In the early years of the formation of incorporated irrigation districts a great deal of the litigation arose over the validity of the bonds of the districts, and investors were slow in making this class of investments. In 1889, to meet this situation, the California legislature provided by the act known as the "Confirmation Act," (174) a special proceeding to be brought by the board of directors in the superior court of the county in which the lands of the district, or some part thereof, were situated, to examine into,

(169) Baltes v. Farmers' Irr. Dist., 60 Neb. 310, 83 N. W. 83 ('00); Kinkade v. Witherop, 29 Wash. 10, 69 P. 399 ('02).

(170) Shepard v. Tulare Irr. Dist. [Cal.], 94 Fed. 1 ('99). Mandamus will lie to compel the treasurer of an irrigation district to pay the interest on bonds—Hewell v. Hogin, Treas., — Cal. —, 84 P. 1002 ('06).

(171) Marra v. San Jacinto & P. V. Irr. Dist. [Cal.], 131 Fed. 780 ('04). See, also, Board of Supervisors of Riverside Co. v. Thompson [Cal.], 122 Fed. 860 ('03).

(172) Marra v. San Jacinto & P. V. Dist., *supra*.

(173) Herring v. Modesto Irr. Dist. [Cal.], 95 Fed. 705 ('99); *ante*, §99.

(174) Laws 1889, p. 212.

approve and confirm the proceedings of the board and of the district providing for the issue and sale of the bonds. The later act of 1897 provides that the board of directors may bring an action in the superior court of the county in which the office of the board of directors is located, to determine the validity of any levy or issue of bonds. If the board does not begin such a proceeding it may be brought in California by any person owning property within the district that has been assessed, within thirty days after the levy of the assessment or the issuance of the bonds. (175) The order of confirmation entered in such a proceeding is, as to a proper compliance with all the provisions of the act, conclusive upon a landowner of the district who does not appear at the confirmation proceedings. These being proceedings *in rem*, the landowner is bound thereby if there has been due publication of notice as provided by the statute, notwithstanding there has been no personal service of summons upon him. (176) By this proceeding the purchaser of the bonds of an irrigation district is protected from litigation growing out of attacks upon the bonds by various individual electors of the district as well as by the district officials and the district itself. Encouraged by a statutory proceeding so specific and effective, this class of securities is now fast coming to be considered a perfectly safe form of investment. It is impossible, in a work of this size, to treat in detail all the numerous questions that have arisen in connection with irrigation district bonds. For such detailed treatment the reader is referred to a work dealing exclusively with public

(175) *Post*, Statutes California, ch. 34, §§263-284.

(176) Crail v. Board Directors Poso Dist., 87 Cal. 140, 26 P. 797 ('90). For other cases under the acts of 1889 and 1897, see Board Directors Modesto Irr. Dist. v. Tregea, 88 Cal. 334, 26 P. 237 ('91); *In re* Madera Irr. Dist., 92 Cal. 296, 28 P. 272, 675 ('91); Fallbrook Irr. Dist. v. Abila, 106 Cal. 355, 39 P. 794 ('95); *In re* Central Irr. Dist., 117 Cal. 382, 49 P. 354 ('97); Miller v. Perris Irr. Dist. [Cal.], 85 Fed. 693 ('98); Rialto Irr. Dist. v. Brandon, 103 Cal. 384, 37 P. 484 ('98); People v. Linda Vista Irr. Dist., 128 Cal. 477, 61 P. 86 ('00); Kinkade v. Witherop, 29 Wash. 10, 69 P. 399 ('02); Nampa & M. Irr. Dist. v. Brose, — Ida. —, 83 P. 499 ('05); Anderson v. Grand Val. Irr. Co., — Colo. —, 85 P. 313 ('06).

securities. Suffice it to say for the present occasion that the purchaser of the bonds of incorporated irrigation districts has now nothing to fear either from unsympathetic statutes or decisions.

§ 103. Corporate Nature.

It is well settled that an irrigation district is a public corporation, organized for the purpose of constructing and operating improvements that are for the public welfare, and that its officers are public officials. (177) They have been called municipal corporations. (178) However, it has been held that such a district is not a municipal corporation within the meaning of the constitutional provision limiting the amount of the indebtedness of a "county, city, town, school district or other municipal corporation." (179) But the court could have reached the same conclusion and perhaps with better reason if it had held that irrigation districts were not affected by the constitutional provision referred to, because at the time of the adoption of the constitution such districts were unknown, and the words "municipal corporations," as there used and understood, could not have been intended to embrace this new species of corporate organization. As a public corporation its organization cannot be collaterally attacked, (180) nor can the district itself plead the illegality of its own organization as a defense to an action brought upon bonds issued by it. (181)

(177) Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112 ('96), 17 Sup. Ct. 56; Herring v. Modesto Irr. Dist. [Cal.], 95 Fed. 705 ('99); Turlock Irr. Dist. v. Williams, 76 Cal. 360, 18 P. 379 ('88). Central Irr. Dist. v. De Lappe, 79 Cal. 351, 21 P. 825 ('89); Crall v. Poso Irr. Dist., 87 Cal. 140, 26 P. 797 ('90); *In re* Madera Irr. Dist., 92 Cal. 296, 28 P. 272, 675 ('91); Lincoln & Dawson Co. Irr. Dist. v. McNeal, 60 Neb. 613, 83 N. W. 847 ('00).

(178) Herring v. Modesto Irr. Dist. [Cal.], 95 Fed. 705 ('99).

(179) Board of Directors Middle Kittitas Irr. Dist. v. Peterson, 4 Wash. 147, 29 P. 995 ('92). In this case the court held that such districts were not public corporations, but *quasi* public.

(180) Quint v. Hoffman, 103 Cal. 506, 37 P. 514 ('94); People v. Linda Vista Irr. Dist., 128 Cal. 477, 61 P. 86 ('00); Miller v. Perris Irr. Dist. [Cal.], 85 Fed. 693, 92 Fed. 263 ('99); Purdin v. Wash. Nat. Bldg. & Inv. Assn., — Wash. —, 83 P. 723 ('06).

(181) Herring v. Modesto Irr. Dist. [Cal.], 95 Fed. 705 ('99).

CHAPTER 17.

FEDERAL CONTROL THROUGH RECLAMATION SERVICE.

§ 104. The "Reclamation Act."

The most important congressional legislation, from the irrigationist's standpoint, is the act of July 17th, 1902, known as the "Reclamation Act."(182) This act provided that all moneys received from the sale and disposal of public lands in all of the arid and semi-arid states excepting Texas, should be set aside and known as the "reclamation fund," to be used in the construction of irrigation works for the storage, diversion and development of waters for the reclamation of arid and semi-arid lands. This act made possible the construction of irrigation systems and reservoirs theretofore impossible. These vast enterprises will give to the farmer and home-builder water for his land at the lowest possible cost of construction, with no fancy profit for some promoter. Works constructed by private corporations are built, of course, for profit, and every dollar that the settler can pay is sure to be exacted. The possible saving in cost to the consumer, and the projection of irrigation works too large and expensive for private enterprise, with the myriad of homes upon the arid wastes that they foretell, makes this act, short and simple though it is, one of the great landmarks in the legislation of the country.

§ 105. The Act in Operation.

The origin of all federal authority in this connection is necessarily traceable to congress, and congress has made the secretary of the interior the responsible officer, from whom all others connected with the reclamation service derive their authority. The reclamation act is very short and makes no provision as to the manner of carrying out its very general provisions. This is left entirely in the hands of the secretary of the interior, who, by certain rules and

(182) *Post*, §§178-178*h*.

regulations, provides for the detailed work necessary to such large enterprises. Every project for new irrigation works must finally be submitted to the secretary of the interior, and must have his approval. The chief engineer of the reclamation service and the director of the geological survey are responsible for the initiative estimates and the preparation of the project for presentation to the secretary. When such plans have once been approved they must not be departed from without the express permission of the secretary of the interior or the chief engineer. A part of the original investigation to determine the feasibility of a given project is an examination of the title to the lands involved in the project. It is thus ascertained whether each tract is public or private land; and of every tract that may be used for a right of way a complete abstract of title is required. The secretary of the interior is authorized to acquire rights to property necessary for any given project by condemnation or purchase. The act also provides that the secretary of the interior shall proceed in conformity with the laws of any state or territory relating to the control, appropriation, use or distribution of water used in irrigation. The notice of appropriation is usually filed in the name of some person designated by this official or by the director of the geological survey. (183) Many of the states and territories have enacted laws especially providing for the appropriation (184) of water by the United States, in carrying out the provisions of the reclamation act. (185)

§ 106. Water Users' Associations.

In developing irrigation projects in connection with which there is a considerable proportion of land in private ownership, it has been found necessary to

(183) For form of notice, see *post*, §184*a*.
(184) *Ante*, §§41-42.
(185) Montana Laws '05, p. 80; New Mexico Laws '05, p. 227, §22; North Dakota Rev. Codes '05, §7639; Oklahoma Sess. L. '05, p. 287, §26; Oregon Gen'l L. '05, p. 401, §2; South Dakota Sess. L. '05, p. 209, §36; Washington, Pierce's Code '05, §5903*b*.

provide some means of dealing with the private owners as a body, as it would be almost impossible to bring to any definite conclusion negotiations with hundreds of individuals whose interests have many points in common, but many also which are different if not conflicting.

The secretary of the interior has, therefore, required that the settlers who will ultimately receive water from the projected system, shall form an incorporated association, in order that all contracts and agreements may be made between such an association and the government. (186) Accordingly, to facilitate the construction of government projects and to aid in making the secretary's requirements more effective, laws have been passed in several of the states and territories providing especially for the incorporation of "Water Users' Associations," (187) and exempting them from taxation. (188) The first association organized was "The Salt River Valley Water Users' Association," in Arizona. A copy of the articles of incorporation of this association can be found in the second annual report of reclamation service, 1902-03, page 76. It shows the result of careful preparation by both state and federal officials. This form is adaptable to any of the arid or semi-arid states,—requiring only such changes as are necessary to suit local conditions. (189) In Nevada, by the act of 1903, (190) the state engineer is required to co-operate with the department of the interior in all matters relating to the appropriation of waters, measurement of streams and distribution of waters.

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(186) *Post*, note 189.

(187) Colorado Sess. L. '05, p. 360, §1; Montana Laws '05, p. 150, §1; New Mexico Laws '05, p. 43, §1; North Dakota Rev. Codes '05, §7667; Oklahoma, p. 296, §48.

(188) *Post*, §166.

(189) A pamphlet published by the department of the interior entitled, "Organization of Water Users' Associations," contains forms for articles of incorporation, by-laws, contracts, etc. This pamphlet, as well as the reports of the meet ngs of the engineers engaged in the reclamation service, may be had by addressing the secretary of the interior or the chief engineer, Reclamation Service, Washington, D. C. The Arizona form is set out, *post*, ch. 32.

(190) Stat. Nev. 1903, p. 18.

The act even has the doubtful provision that the state engineer shall be appointed by the governor only upon the recommendation of the secretary of the interior, unless after being requested so to do the secretary fails to make a recommendation. This unusual act is said to owe its inception to Senator F. G. Newlands of Nevada. It is posited upon a peculiar principle of co-operation, but if state activities are to be maintained at all, this particular form of co-operation will not often be imitated. Nevertheless the general spirit of co-operation between the state and federal governments in the arid West is to be commended and should be fostered by all who have at heart the future welfare of this great empire just beginning to come into view. Petty jealousies cannot be permitted to retard or interfere with the rapid progress which is possible by state and national co-operation. But the government under the "Reclamation Act" is not engaged in philanthropic work. It is engaged in a purely business enterprise, and it requires assurances before undertaking the construction of any new project that the project when completed will produce results that will repay the cost to the government and justify its construction. The persons joining a Water Users' Association must, therefore, agree to turn over to the management of the association the water which they have theretofore appropriated, to be administered in connection with the additional water supply to be furnished from the government irrigation system. Such former water rights, as well as those secured from the government system, are to be made appurtenant to the irrigated lands. In this way such lands are held to pay the charges for water rights acquired by the "Reclamation Act," and the lands also stand as security for the government charge for water. Such charges thus become a lien upon the land, and, in case of default in payment, the Water Users' Association may enforce the same. The object of the reclamation act and of the government officials in carrying out its provisions is to promote the settlement of the country in small farms and to discourage large speculative

holdings. The secretary of the interior has, therefore, provided that no member of an association can apply for and obtain water from the government system for more than 160 acres, and requires every member owning lands in excess of that limit to agree to dispose of such excess lands. He need not dispose of his excess lands until the government is ready to furnish the water, but if he fails to do so at the proper time, the association is empowered to do so for him. The applicant for a water right, (191) under the government works, must either be a *bona fide* resident on such land or an occupant thereof residing in the neighborhood. Water rights cannot be obtained for unoccupied land in private ownership, thus the speculator is not encouraged to hold such tracts for a future rise in value. It is impossible in this work to give in detail all the regulations and rules promulgated by the secretary of the interior. The reader is referred to the bulletins and reports of the department, (192) and to the forms published in this volume. (193)

§ 107. Some of the Government Projects.

It would be impossible in this volume to give an extended account of the numerous projects for the reclamation of the arid lands of the West, now either planned or in course of construction by the United States. It will serve to inform the reader of the character and magnitude of this work to briefly present the principal facts relating to a few of these undertakings. For convenience they will be grouped under the name of the state wherein the principal portion of the projected works are located. In Arizona, the *Salt River* project, located in Maricopa and Gila counties, will irrigate 200,000 acres at an estimated cost of $3,600,000. In Nevada, the *Truckee-Carson* project, one of the largest if not the largest project approved up to the last of 1906, will reclaim

(191) *Post*, §129.
(192) Second Ann. Rep. Reclamation Service, 1902-03. Reports of conference of engineers of the Reclamation Service, 1904-05.
(193) *Post*, §§168-185.

460,000 acres in addition to increasing the supply of water for lands already under cultivation, furnish water for San Francisco, Cal., and Ogden, Utah, the transportation facilities of the Southern Pacific Railroad "Ogden Route," at an estimated cost of $2,740,000.

The *Huntley* project in Montana provides for the irrigation of about 35,000 acres at a cost of $900,000. The water supply is taken from the Yellowstone river and reaches the irrigable area within two miles.

The *Fort Buford* project in Montana and North Dakota will irrigate 60,000 acres, costing $1,800,000, diverting the water of the Yellowstone river in Montana and conveying it to lands lying in Montana and North Dakota.

The *Milk River* project in Montana, costing $1,000,000, will ultimately reclaim 450,000 acres of land. It will consist of a series of reservoirs and canals, and is divided into sub-projects called "The St. Mary's lakes reservoir and supply canal," "The Marias river sub-project," and "The Lower Milk project." The *Bismarck* project in North Dakota will cover about 20,000 acres extending along the Missouri river, and will cost a comparatively small sum to complete. The *Hondo* project in New Mexico is another small system costing about $280,000 and irrigating about 10,000 acres.

In Idaho the United States has in course of construction or contemplation three projects of varying size, that when completed will reclaim about 1,300,000 acres of what is now arid land. The *Minidoka* project contemplates the reclamation of about 60,000 acres lying under the canal system, a large part of these lands lying above the canals which it is proposed to cover by pumping systems. The water for these lands will come from the Snake river. At the point of intake provision is made for the installation of a power house which ultimately will furnish power for the operation of the pumping system. The main canal and laterals will have a total length of about 300 miles, and it is expected that the system will be finished during the year 1906. It is estimated that water rights will cost about $26.00 per acre. The

Payette-Boise project provides for the reclamation of 250,000 acres, with the waters of the Payette and Boise rivers utilized by means of storage reservoirs at the headwaters of these streams. Work on the first division is now in progress and will be completed about March 1st, 1908. The cost is estimated at $1,300,000. About three-fourths of the land under this project is in private ownership, the remainder being federal and state lands, and it is estimated that when reclaimed the lands will have a market value of from $75.00 to $150.00 per acre.

The *Snake River Reservoir System* when completed will consist of a large number of reservoirs on the headwaters of the Snake river, with a combined capacity of more than 2,000,000 acre-feet of water, or more than enough for the late irrigation of 1,000,000 acres of land. This project involves the adjustment of large and complex interests and will, during years of ordinary water supply, utilize practically the entire annual run-off of the Snake river.

In Washington and Oregon three projects, involving the expenditure of about $3,950,000 and reclaiming about 79,000 acres of arid land, have the approval of the secretary of the interior.

The *Okanogan* project consists of a large reservoir in the bed of the Salmon river.

The *Yakima* project will be built in units, viz: the Tieton unit, Sunnyside unit and Yakima Indian Reservation unit. The first two of these have been approved by the secretary of the interior. The source of supply will be storage created by damming up three lakes at the headwaters of the Yakima river, and one lake at the headwaters of the Naches river, the combined storage being about 800,000 acre-feet. Other projected works are designated as the "Wapato unit," "Kittitas and Benton units."

In California the *Yuma* and *Klamath* projects have been approved and construction work on the former already commenced. This project, when completed, will have cost about $3,000,000 and will serve 85,000 acres. The *Klamath* project will cover about 236,000 acres, at a cost of about $20.00 per acre.

§ 107, Some of the Government Projects.

The *Nebraska-Wyoming* project is now in course of construction and is known as the Pathfinder Dam, being situated in southeastern Wyoming and western Nebraska. This dam will be 210 feet high, 100 feet thick at the base, 16 feet at the top will form an arch, having a radius of about 150 feet, and will back the water so as to cover 23,000 acres, impounding 1,000,000 acre-feet of water. A system of canals is proposed to convey the water to the various localities where it will be used. The farm unit under this project is limited to 80 acres.

The *Belle Fourche* project in the western part of South Dakota is well under construction. This system will consist of an inlet canal, a reservoir on the Belle Fourche river and a distributing canal about seventeen miles long. The reservoir will impound about 250,000 acre-feet, and the system will cover about 60,000 acres. The cost of the entire system is estimated at $1,500,000.

The *Strawberry Valley* project in Utah is designed to supplement the water supply in the Provo valley of that state. It is planned to carry about 50,000 acre-feet of flood waters from the headwaters of the Colorado river, on a tributary called the Strawberry river, through the rim of the Great Basin by a tunnel three and one-half miles long. The tunnel will have a capacity of about 500 second feet of water, will be lined with concrete and will be fed from a reservoir in Strawberry valley.

In Colorado the project generally known as the *Gunnison Tunnel*, but entitled the *Uncompahgre* project, has for its object the reclamation of 147,000 acres of land, which will be accomplished by turning the waters of the Gunnison river into the Uncompahgre valley by means of a tunnel six miles long. The tunnel will be lined with concrete and have an average section of waterway of 100 square feet, with a velocity of 13 feet per second. A large concrete-lined canal will conduct the water from the outlet of the tunnel up the valley to a point near the head of irrigation in Montrose county, where the water will probably be turned into the Uncom-

pahgre river, and from there conveyed to the consumers, through the various canal and ditch systems now in use. The statistics relating to these various projects are extremely interesting, but too voluminous for a work of this character. Articles written by various government engineers describing these undertakings are to be found in the September, 1906, number of the *Pacific Monthly*. (194)

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(194) A bulletin issued by the U. S. Reclamation Service in 1905, entitled "Irrigation Projects of the U. S. Reclamation Service," gives the following table of projects, the amount set aside for the commencement of the work, and the acres irrigable, together with the total amount set aside for reclamation work:

PROJECTS NOW UNDER CONSTRUCTION.

STATE	PROJECT	Amt set aside for beginning construction	Acres Irrigable
Arizona	Salt River	$3,600,000	180,000
California and Arizona	Yuma	3,000,000	85,000
Colorado	Uncompahgre	2,500,000	125,000
Idaho	Minidoka	1,300,000	60,000
Montana	Huntley	900,000	35,000
Montana and North Dakota	Fort Buford	1,800,000	60,000
Nebraska and Wyoming	North Platte	3,500,000	100,000
Nevada	Truckee-Carson	2,740,000	100,000
New Mexico	Hondo	280,000	10,000
South Dakota	Belle Fourche	2,100,000	80,000
Wyoming	Shoshone	2,250,000	125,000

PROJECTS APPROVED BY THE SECRETARY OF THE INTERIOR.

Oregon and California	Klamath Falls	$1,000,000	236,000
Oregon	Malheur	2,250,000	100,000
Montana	Milk River	1,000,000	200,000
North Dakota	Bismarck		15,000
Pumping	Buford-Trenton	550,000	18,000
*Washington	Palouse	2,800,000	80,000
Idaho	Payette-Boise	1,300,000	250,000

The total sum set aside for all classes of projects is $34,270,000, and the amount of land to be irrigated is 1,909,000 acres. The average value of irrigated land in the United States is $47 per acre. This acreage will, therefore, add $89,723,000 to the taxable property of the United States in land values alone. According to the census report of 1900, the average annual income from irrigated land is $15 per acre. On this basis an income of $28,735,000 per annum will be added to the nation's wealth. The approximate amount expended up to June 30, 1905, is $5,000,000.

*Secretary of Interior approved project, but at a subsequent meeting of board of consulting engineers postponement of construction was decided upon.

CHAPTER 18.

INTERSTATE STREAMS—KANSAS-COLORADO CASE.

§ 108. Interstate Streams—In General.

In recent years a number of cases have been brought involving the right to use the waters of interstate streams. The Kansas-Colorado case, (194*a*) is the only one of them in which states are parties to the action and in which the issue is squarely drawn between a commonwealth which follows the dual system of California, (195) and one that is firmly wedded to the doctrine of appropriation. (196) In the cases decided by the federal circuit courts and circuit court of appeals, the courts have invariably held that state lines do not affect the rights of parties to appropriate and use the waters of such streams. (197)

§ 109. Statement of the Case.

The Arkansas river rises near the central part of the state of Colorado and flows southeasterly through parts of Colorado and Kansas. The latter state was admitted into the Union in 1859, and settlement of the public lands, particularly along its watercourses, followed with considerable rapidity, and as alleged by the state of Kansas in its bill filed against Colorado in 1902, the riparian lands were largely and extensively irrigated by the sub- or under-flow from the Arkansas river. The state of Colorado, and the various canal and ditch companies joined as defendants, began appropriating and diverting the waters of the Arkansas in Colorado for the purpose of irrigating dry, barren, arid and non-riparian lands in the latter state, and have continued to appropriate and divert such waters until the normal flow of the river is entirely consumed within such state, leaving the state of Kansas and its citizens along the valley of said river, as it is alleged, without the natural

(194*a*) *Post*, next section.
(195) *Ante*, §20.
(196) *Ante*, §22.
(197) *Ante*, §29.

and normal flow of the river, and the moisture naturally furnished the soil for a great distance on either side thereof, to their great damage and injury. An injunction was prayed for restraining the defendants from any future diversion of the waters of the said river. (198)

§ 110. Contentions as to the Evidence.

On the part of the complainant, the state of Kansas, it is contended that the evidence shows that prior and up to about the year 1888, the Arkansas river flowed in such a volume that the underflow on either side of the stream created a subterranean stream, and sub-irrigated the soil of the valley so as to produce abundant crops; that in addition thereto the river furnished abundant water power for the Arkansas City Water Power Company, enabling it to furnish cheap power to the citizens of that locality; that the diversion of the water in Colorado has so diminished the flow of the river as to lower the subterranean stream, called the underflow, and has withdrawn the sub-irrigation of the soil until the farms theretofore producing abundant crops have been rendered less productive and profitable, and water has been wholly unavailable for power purposes. On the part of the defendants the state of Colorado, and the various canal and ditch companies, it is contended that the evidence shows that the Arkansas river, from time immemorial, has practically been a broken stream, *i. e.*, two streams,—what is termed the "Colorado-Arkansas" and the "Kansas-Arkansas"; that the main stream rises in the mountains of Colorado and flows down to a point in eastern Colorado near the Colorado-Kansas line, where it has always disappeared in a sink or sand bed, and from there to the neighborhood of Dodge City, Kansas, the river-bed is wholly dry, except in times of flood; that beyond that dry bed, beginning near Dodge City, a new stream arises and flows on through Kansas, which it is claimed is the Arkansas proper. The expert testimony on be-

(198) A brief statement of the case contained in the Kansa bill will be found in Taylor's "Jurisdiction and Procedure of th U. S. Supreme Court," §36.

half of Colorado tends to show that the diversion of the early spring flow of the river in Colorado causes such diverted water to sink into the soil and, following the subterranean channels in an easterly direction, it ultimately finds its way back to the main river channel by seepage or percolation. This return begins in eastern Colorado and extends into western Kansas. It is further claimed by Colorado that the land on each side of the river in Colorado acts as a reservoir, holding back the water that would otherwise, in the spring of the year, flow down in flood time to the sea, doing no particular good in any state. It is claimed by the defendants that the evidence, instead of showing a decrease in assessed valuations and a depreciation in crops along the Arkansas valley in the state of Kansas, shows a very large increase, and that therefore Kansas has failed to prove any damage resulting from the diversions of water made in Colorado, and that in western Kansas many large irrigation systems have been constructed for the purpose of appropriating, diverting and conveying, and they have appropriated, diverted and conveyed the water from the river to lands lying many miles away. Briefly stated, these are the principal facts which each party to the action claims are proven by the great volume of testimony.

In the succeeding sections we will consider the legal propositions presented for the consideration of the supreme court of the United States.

§ 111. The Kansas View of the Law.

It is contended by the eminent counsel representing the complainant, "The State of Kansas," that the territory now comprising the state of Kansas, when it was a part of the territory of Missouri, was affected by the adoption of the common law in Missouri by the territorial legislature in 1816, (199) and that the act of the legislature of Kansas, passed in 1855, (200) also subjected this territory to the rule of the common law. This latter act was re-enacted

(199) 1 Terr. Laws Mo., p. 436, c. 154.
(200) Laws, 55 Kan., p. 469, c. 96.

verbatim by the first state legislature in 1862 (201) Counsel also contend that no statute, decision of the courts or custom of the people has repealed, changed or altered the application of the common-law principle relating to the rights of riparian proprietors; that the state of Kansas is itself the owner of riparian lands and is entitled to the flow of the Arkansas river as it was wont to flow subject only to a "reasonable use" of its waters by the upper riparian owners. It is set forth in the brief filed by the complainant, (202) that upon the question of riparian rights the states of the Union divide themselves into three classes, and that "in each class there is a system of laws suited to the condition and wants of the people":

First. The states where the practice of irrigation does not prevail and where the rule of the common law is in full force. To this class belong the Eastern, Southern, Middle and some of the Western states.

Second. Those states where from their natural physical conditions there are no valley or river saturated lands, and there is no foundation for extensive riparian rights, but where different conditions create a new and antagonistic rule of law known as the right of prior appropriation. To this class belong the states of Colorado, Wyoming, Utah, Nevada, Idaho and perhaps Montana.

Third. Those states which embrace the characteristics and conditions of both the foregoing classes; one part of which is humid and another part arid; one part of the soil of which is naturally fertile and another part is unproductive without irrigation; one part of the territory of which is adapted to riparian rights, and the other part is adapted to the rights of appropriation, and where two different systems are needed for the full development of these two divergent parts. To this class belong California, Oregon, Washington, North and South Dakota, Nebraska, Kansas and Texas. (203) Again, it is said in the Kansas brief:

(201) Laws '62, p. 678. See, also, Gen. Stat. '05, §8746.
(202) Brief, p. 183.
(203) Counsel cite as showing the unity of view entertained in the states comprising this third class: Lux v. Haggin, 69 Cal. 255, 10 P. 674 ('86); Gould v. Eaton, 117 Cal. 539, 49 P.

§ 111, The Kansas View of the Law.

"It is thus seen that Kansas is a common-law state so far as riparian rights are concerned, but, like the states of California, Oregon, Washington, North and South Dakota, Nebraska and Texas, Kansas has adopted a rule that will allow the largest development of its territory consistent with the rights of its citizens. As to how far Kansas may see fit to modify the most extreme form of the rule of riparian rights is not before the court, and this does not affect the rights of Kansas as alleged and proved in this case, nor does it affect the wrongs committed by the state of Colorado and its co-defendants as shown by the evidence." (204)

The admission in this paragraph is but slightly veiled and seems to imply that when Kansas once gets the waters in dispute away from Colorado, it may apply with impunity either system it likes—riparian rights or appropriation. The essential legal contention of the state of Kansas is based upon the common-law doctrine of riparian rights, and the resulting damage to the lands, crops and water-power plants belonging to the state or her citizens. She does not deny the right of the state of Colorado to adopt the doctrine of appropriation, but contends that it must be exercised with reference, and subject to the rights of riparian proprietors in a lower state, where those riparian rights vested prior to the appropriations made in the upper state.

§ 112. The Colorado View of the Law.

The defendants, through their able counsel, devote a large portion of their brief to a discussion of the evidence essaying to show that "Kansas prosperity has suffered no injury," that "the Arkansas

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577 ('97); Benton v. Johncox, 17 Wash. 277, 49 P. 495 ('97); Lone Tree D. Co. v. Cyclone D. Co., 155 So. Dak. 519, 91 N. W. 352 ('02); Crawford Co. v. Hathaway, 67 Neb. 325, 93 N. W. 781 ('03); Irrigation Co. v. Hudson, 85 Tex. 587, 22 S. W. 398 ('93); Shamleffer v. Mill Co., 18 Kan. 24 ('77); Wood v. Fowler, 26 Kan. 682 ('82); Koen v. Klein, 63 Kan. 484, 65 P. 684 ('01); Sturr v. Beck, 133 U. S. 541, 10 Sup. Ct. 350 ('90).

(204) Brief, p. 186, citing 3 Farnham "On Waters," 1903; Jones v. Comm., 39 Ore. 30, 64 P. 855 ('01).

river *ut currere solebat*, has always been an intermittent stream, and, in times of low water, has been a 'broken river';" that "the diversion and use of the waters of the Colorado-Arkansas have not diminished the 'low water' flow of the river in Kansas"; that the diversion and use of the waters of the Colorado-Arkansas have not diminished the so-called 'underflow' in the Arkansas valley in Kansas"; that "the western Kansas ditches have not suffered by reason of irrigation in Colorado"; that "the right to appropriate water from streams and use such water for irrigation of lands is essential to the prosperity and even the existence of the inhabitants of nearly one-half of the United States"; that "Colorado, relying on its right to utilize the waters of its natural streams upon adjacent lands, has converted arid and uninhabited wastes into populous districts, with productive farms and thriving towns and industries"; and that "Kansas has no riparian rights derived from the so-called underflow." The defendants contend that the evidence tends to show that the ground water in the Arkansas valley within the state of Kansas, is what is termed sheet water, or percolating water, oozing through the sands in no definite channel and not governed by the well known rules relating to underflow, or waters flowing in known subterranean channels, (205) but is subject to the rules governing percolating waters; (206) and that, admitting that the state of Kansas has certain riparian rights as claimed, she has no right of action against these defendants, because she has failed to prove any injury inflicted or threatened. It is also contended by Colorado that the state of Kansas, by recognizing the doctrine of appropriation, by the act of 1886 (207) is precluded from asserting that her "riparian rights" should take precedence of the beneficial use of the waters of the Arkansas river upon arid lands in Colorado, and that long before the institution of this suit

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(205) *Ante*, §33.
(206) *Ante*, §32.
(207) Defendant's Brief, p. 281, now Gen. Stat. Kan. '05, §3989.

and even before the beginning of any substantial diversion of the waters of the Arkansas in Colorado, the sovereign state of Kansas offered a standard upon this subject,—diversion and use for irrigation—to which the state of Colorado as a defendant has the right to appeal. (208)

§ 113. Other Matters in Argument.

The defendants further contend that the owners of land in Kansas bordering on the Arkansas river have no vested rights in that river which the complainant as *parens patriae* can assert against them, the defendants. (209) This contention is based upon the principle that owners of lands bordering upon a meandered stream can have no vested rights in the waters of such stream; that "the right of private property in a watercourse is derived as a corporeal right or hereditament, from, or is embraced by, the ownership of the soil over which it naturally passes." (210) Counsel quote from the decision rendered by Judge Brewer in the case of Wood v. Fowler, (211) as follows:

"The title to the soil being in the state and the stream being a public highway, obviously the ownership of the ice would rest in the general public, or in the state as the representative of the public. The riparian proprietor would have no more title to the ice than he would to the fish. It simply is this, that his land joins the land of the state. The fact that it so joins gives him no title to that land or to anything formed or grown upon it, any more than it does to anything formed or grown or found upon the land

(208) Citing Missouri v. Illinois, 26 Sup. Ct. 268, 270 ('06), and quoting as follows: "Where, as here, the plaintiff has sovereign powers and deliberately permits discharges similar to those of which it complains, it not only *offers a standard to which the defendant has the right to appeal*, but as some of those are above the intake of St. Louis it warrants the defendant in demanding the strictest proof that the plaintiff's own conduct does not produce the result, or, at least, so conduce to it that courts should not be curious to apportion the blame."

(209) Defendant's Brief, p. 288, *et seq.*

(210) Citing Angell "On Watercourses" (7th ed.), §5.

(211) 26 Kan. 682 ('82).

of an individual neighbor." (212) Counsel also contend that independent of the last consideration the evidence fails to disclose any injury to any "vested right" in individual proprietors

Another contention is, that even if the common-law principle of riparian rights be applied to this case, it but confirms the right of the state of Colorado and its people to use the waters of the Arkansas river for the irrigation of lands in Colorado. The reason alleged for this contention is that under approved authorities, (213) the common law recognized the use of water for irrigation purposes, that in the semi-arid regions and in the state of Kansas, the courts, in applying the common-law doctrine of riparian rights, have held that the use of water by a riparian proprietor for the irrigation of his riparian land is from the necessities of the country a natural want and use, and that such use must naturally consume a large or small part of the waters of the stream, and under certain circumstances such use would not be unreasonable if it consumed the entire stream. (214) Under such a construction of the common law it is argued that the only question to be determined is, What are riparian lands? That in answering this question we should again take into consideration the necessities of the country. Considering such neces-

(212) Counsel cite also Crawford Co. v. Hathaway, 67 Neb. 325, 93 N. W. 781 ('03), and S. C. Crawford Co. v. Hall [Neb.] ('03), 60 L. R. A. 889, to the effect that the waters in such streams would be held to be *publici juris*, and not subject to riparian claims by the adjoining landowner.

(213) But see *ante*, §§17, 18.

(214) Citing Van Ness v. Pacard [U. S.], 2 Pet. 137 (1829); Wheaton v. Peters [U. S.], 8 Pet. 591 (1834); Clark v. Nash, 198 U. S. 361, 25 Sup. Ct. 676 ('05); Pennock's Estate, 20 Pa. St. 268; Dawson v. Coffman, 28 Ind. 220 ('67); Penny v. Little, 4 Ill. 301 ('41); Embrey v. Owen, 6 Exch. 353; Stein v. Burden, 29 Ala. 127; Anderson v. Cincinnati So. Ry, 86 Ky. 44; Hazeltine v. Case, 46 Wis. 391; Evans v. Merriweather, 3 Scam. [Ill.] 492 ('41); Wadsworth v. Tillotson, 15 Conn. 366; Weston v. Alden, 8 Mass. 135; Anthony v. Lapham, 5 Pick. 175; Elliott v. Fitchburg R. R., 10 Cush. 191; Yunker v. Nichols, 1 Colo. 551 ('72); Rhodes v. Whitehead, 27 Tex. 304; Irrigation Co. v. Vivian, 74 Tex. 170, 11 S. W. 1078 ('89); Crawford Co. v. Hathaway, 67 Neb. 325, 93 N. W. 781 ('03); Crawford Co. v. Hall [Neb.], 60 L. R. A. 889 ('03); Clark v. Allaman, — Kan. —, 80 P. 571 ('05). See *ante*, §§17, 18.

sities the conclusion is reached that all lands within the valley or watershed of the stream should be held to be riparian. (215) Again, it is contended that the riparian rights along the Arkansas river in Kansas are subordinate to the riparian rights along that stream in Colorado. Under the decisions construing the law in the states where the two systems are recognized, (216) the lower riparian proprietors' rights are always subject to a reasonable use of the water of the stream by the upper riparian proprietors, even though that use should consume all the water of the stream. (217) As to the contention of counsel for the state of Kansas to the effect that those who are prior in time are prior in right, and the riparian proprietors who settled in Kansas along the valley of the Arkansas river prior to the settlement of the Arkansas valley in Colorado, have thus acquired the better right, it is pointed out that the vesting of riparian rights does not depend upon the question of priority, that a lower riparian proprietor who is prior in time is always subject to the rights of an upper proprietor, regardless of how much later he may have acquired his riparian property, and that the complainant, the state of Kansas, made no attempt to prove any prior rights by virtue of a prior appropriation. The defendants also contend that the state of Kansas and her citizens acquired whatever rights they may have to the waters of this river with full knowledge of its source, and of the fact that there would always be an increasing number of riparian proprietors above whose exercise of their right of reasonable use would diminish the flow of the stream. The contention of Kansas as to the construction of the common law relating to riparian rights as changed, modified or enlarged throughout the arid or semi-arid region, receives attention in the Colorado briefs, but without any extended argument in favor of the

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(215) Chauvet v. Hill, 93 Cal. 407, 28 P. 1066 ('92); Bathgate v. Irvine, 126 Cal. 135, 58 P. 442 ('99); So. Cal. Inv. Co. v. Wilshire, 144 Cal. 68, 77 P. 767 ('04); Clark v. Allaman, — Kan. —, 80 P. 511 ('05). See *ante*, §19.

(216) *Ante*, §20.

(217) Citing Clark v. Allaman, — Kan. —, 80 P. 571 ('05).

doctrine of appropriation as opposed to riparian rights. This case is still pending in the United States supreme court, and that fact alone rules out of order, in an Irrigation Manual, impartially prepared for use in all the Western states, any individual expression of opinion as to the rights of the respective parties to the suit or as to the probable outcome of the litigation. Through this condensed outline of the position taken by each party the attention of the reader is drawn to the first case where the two systems of riparian rights and appropriation have clashed in the highest court in the nation, and where the parties are two sovereign states, each contending for its special system of water regulation. The outcome of the litigation is of vast importance, not only to the particular states involved, but to all states where similar questions may arise, and especially to those states on or lying along the backbone of the continent and within whose borders many rivers and streams find their source, thence flowing on through many other arid or semi-arid states in their course to the sea.

§ 114. The Government View of the Law.

The United States government intervened through the attorney general's office in this Kansas-Colorado case and has filed in the supreme court a printed argument of 223 pages. This argument contains, first, a brief statement of the case, then a statement of the interest the government has in the questions involved and in the result of the action, and its right to intervene.

A long discussion then ensues as to the jurisdiction of the court to entertain the action. In this connection it is shown that the Arkansas river in the state of Kansas was never navigable and cannot be made so;(218) that it is practically unnavigable above Ft. Gibson in Indian Territory, that the navigable capacity of the Arkansas river has not been interfered with by the alleged acts of the defendants, and hence no duty devolves upon the intervenor to aid complainant to secure relief upon the ground

(218) Gov't Brief, p. 41.

that such acts tend to destroy the navigable capacity of said stream, (219) as the diversion and use of the waters of the river and its tributaries in Colorado do not interfere with the navigable capacity of the stream. (220)

About forty pages of the brief of the government counsel are devoted to showing that the reclamation and cultivation of the arid lands belonging to the government is indispensable to the future growth and prosperity of the nation.

The fifth point in the government brief is stated in these words:

"The public arid lands can not be reclaimed, nor can the policy of the government be carried out under the application of the common-law doctrine of riparian rights, nor under the application of the doctrine as the same has been modified by the legislative and declared by the judicial departments of some of the Western states." (221)

The sixth point treats of the common-law doctrine of riparian rights. (221*a*)

The seventh point is stated in the following language:

"The 'California doctrine' of riparian rights is not suited to the conditions and wants of the people in the states that are partly humid and partly arid.

"1. The California doctrine is not applicable to the Arkansas river.

"2. The decisions of the courts of the states where the California doctrine has been held to prevail are not 'consistent and logical,' and cannot 'be harmonized with each other,' nor do they show a 'unity of view.'" (222)

The eighth point of the government brief is in the following words:

"The 'underflow': its source; whether percolating waters or a subterranean stream; the law which governs subterranean waters.

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(219) *Id.*, p. 57.
(220) *Id.*, p. 66.
(221) *Id.*, p. 118.
(221*a*) *Id.*, p. 138.
(222) *Id.*, pp. 144-156.

"1. Where the common-law doctrine of riparian rights prevails.

"2. Where the common-law doctrine of riparian rights has been modified.

"3. Where the common-law doctrine of riparian rights has been abrogated.

"4. The law of Kansas in regard to subterranean waters." (223)

The ninth point in the government brief is stated thus:

"The doctrine of riparian rights, either in its strict or in its modified form, and the doctrine which is essential to the reclamation and cultivation of the arid lands, viz., the appropriation of the waters of streams for irrigation purposes, are inconsistent and irreconcilable with each other and can not exist in the same state or on the same stream at the same time." (224)

The tenth point of the government brief is as follows:

"The doctrine that a state, by reason of its sovereignty, has 'plenary and exclusive right and power to control and regulate the use of non-navigable waters within its boundary,' would in a great measure prevent the reclamation and cultivation of the public arid lands and, to a large extent, defeat the policy of the government in respect thereto." (225)

The eleventh and last point of the government brief is as follows:

"The law in regard to the waters of non-navigable interstate streams.

"1. *Salus populi est suprema lex.*

"2. The erection of reservoirs to impound the flood waters, which is necessary in order to carry out the policy of the government, as indicated in the so-called 'reclamation act,' will have the effect of maintaining and equalizing the flow of the river in Kansas." (226)

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(223) *Id.*, pp. 158-175.
(224) *Id.*, p. 177.
(225) *Id.*, p. 181.
(226) *Id.*, pp. 198-206.

PART V.

IRRIGATION COMPANIES.

CHAPTER 19.

DITCH, CANAL AND RESERVOIR COMPANIES GENERALLY.

§ 115. Organization and Powers.

Most of the early settlers in the arid and semi-arid region located on or near the banks of the natural watercourses, so that the expense and labor necessary to construct canals and ditches would be within their means, and they were thus both the builders and owners of the ditches and the appropriators of the water carried in them. But, with the rapid growth of this arid region, lands more remote from the streams were taken up and water for their irrigation became an imperative necessity. The ditch builder and owner then was often not the company or person that owned the land and appropriated the water carried in the ditch, for irrigation and canal companies were organized for the sole purpose of constructing large waterways and conveying the water for hire from the natural streams and delivering it to the farmers along the lines of their canals or ditches. These waterways were often of great length and they cost in many instances hundreds of thousands of dollars. The total cost of these canals in Colorado is estimated at $19,678,662. The canal of the Northern Colorado Irr. Co., taken out of the South Platte river and circling around Denver on the south and east, is 85 miles long and traverses four different counties. A map of these waterways and ditches, large and small, in Colorado and other arid states, presents a great network of irregular and interfering lines as intricate and confusing as the venous system of the human body.

These waterways and ditches convey the water to great distances from the natural channel, and frequently across intervening hills and mountains into other watersheds. There is thus brought under cultivation large areas which otherwise would have remained barren and unproductive. The necessity for these companies has been recognized by statute and decision (1) in the arid and semi-arid states, and their formation has been encouraged and their public regulation insisted upon. (2) The companies that will be treated in this part of our work are those known as "irrigation companies," "reservoir companies," "canal companies" or "ditch companies," but no reference is here made to the public corporations known as irrigation districts. (3) When incorporated, irrigation, reservoir, canal or ditch companies are private corporations. (4) and are organized under the general incorporation acts of the several states and territories with a few provisions especially applicable to this class of corporations. They may be organized solely for the purpose of conveying water for hire, (5) or they may be associations of persons formed for the purpose of constructing ditches and conveying water to their own lands and not for hire. The latter, frequently designated "mutual ditch companies," may or may not be incorporated. The relation between incorporated ditch, canal or reservoir companies and their stockholders or members, is the same as in the case of other private commercial corporations, that is, one of contract from which

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(1) Golden Canal Co. v. Bright, 8 Colo. 144, 6 P. 142 ('84); Wheeler v. Northern Colo. Irr. Co., 10 Colo. 582, 17 P. 487 ('87); Combs v. Agricultural D. Co., 17 Colo. 146, 28 P. 966 ('92); Thorpe v. Tenem Ditch Co., 1 Wash. 566, 20 P. 588 ('89); Riverside Water Co. v. Sargent, 112 Cal. 230, 44 P. 560 ('96); and cases cited in following sections.

(2) See statutes, *post*, Part X.

(3) *Ante*, §§98-103.

(4) San Diego Flume Co. v. Souther [Cal.], 90 Fed. 164 ('98).

(5) A corporation does not have all the powers it claims or sets out in its articles of incorporation. Oregon R. R. Co. v. Oregon R. R. Co., 130 U. S. 1, 9 Sup. Ct. 409 ('89). For illustration, see *supra*, §95.

springs a trust relation, binding the corporation to conduct the business of the corporation in the interest of its stockholders. (6) Being trustee for its stockholders the corporation is bound to protect their interests. (7) Accordingly it may maintain an action to protect the rights of the consumers under its ditch as well as its stockholders. (8) Irrigation, reservoir, canal and ditch companies may succeed to the rights of another company. (9) They may buy water rights, (10) and they must keep the highways open for the use of the public. (11)

§ 116. Irrigation Companies as Appropriators of Water. Who Owns Water Right—Company or Consumer?

The irrigation statutes and codes of all of the arid and semi-arid states and territories provide for the diversion of water from the public streams by incorporated companies. (12) The power conferred upon the company by its charter to acquire water rights, (13) does not of itself confer the water rights. These must be acquired in the same manner as though the diversion of water from the natural stream was made by an individual. (14) It has been held that where such a company acquires its rights by legislative grant the legislature cannot grant the exclusive right to the water of a stream to the injury of vested

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(6) Supply D. Co. v. Elliott, 10 Colo. 327, 15 P. 691 ('87); Rocky Ford Canal, Res. L. L. & T. Co. v. Simpson, 5 Colo. App. 30, 36 P. 638 ('94).

(7) Farmers' Ind. D. Co. v. Agri. D. Co., 22 Colo. 513, 45 P. 444 ('96).

(8) Montrose C. Co. v. Loutsenhizer D. Co., 23 Colo. 233, 48 P. 532 ('96).

(9) Colo. Land & Water Co. v. Rocky Ford Canal, Res. L. L. & Tr. Co., 3 Colo. App. 545, 34 P. 580 ('93).

(10) Water Supply & Storage Co. v. Tenney, 24 Colo. 344, 51 P. 505 ('97).

(11) Farmers' Highline C. & R. Co. v. Westlake, 23 Colo. 26, 46 P. 134 ('96).

(12) See statutes, *post*, Part X.

(13) *Post*, §129.

(14) Mud Cr. Irr., Agri. & M. Co. v. Vivian, 74 Tex. 170, 11 S. W. 1078 ('89). See, also, North Pt. Consol. I. Co. v. Utah & S. L. Co., 16 Utah 246, 52 P. 168 ('98); *ante*, §§41-62.

private rights. (15) The statutes recognizing the right of corporations to divert water from the natural stream also provide that the water may be transported from the natural stream for hire and "sale," (16) to the distant consumer. (17) A corporation organized for such purposes is charged with the duty of "selling" or "renting" the water, or more accurately the company's carrying service to the consumer under its ditch, upon proper demand and tender, whenever it has water in its canal or ditch undisposed of. (18) A company cannot arbitrarily refuse to "rent" or "sell" the water, or rather its carrying service, (19) but must have a substantial reason for so doing. (20)

Here the question is pertinent: To whom does the right to use the water belong—to the company that diverts it from the natural stream or to the consumer who actually applies it to a beneficial use on the land? In other words, who is the real appropriator, the company or the consumer? A mere diversion of water from the natural stream is often spoken of, but inaccurately, as an appropriation of so much water; and the company that makes the diversion is, with like inaccuracy, frequently spoken of as the appropriator. As we have seen, the most essential element in making an appropriation of water, is its application to a beneficial use. (21) Corpora-

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(15) Munroe v. Ivie, 2 Utah 535 ('80). It was held in Platte Water Co. v. Northern Colo. Irr. Co., 12 Colo. 525, 21 P. 711 ('89), that the legislature could not confer water rights by grant. Possession and use of the water are necessary to create the right to its continued use.

(16) *Post*, §117, explaining "sale." In Colorado and Arizona and probably in other states the water is not "sold," but only the carrying capacity. Wheeler v. Northern Colo. Irr. Co., 10 Colo. 582, 17 P. 487 ('87); Slosser v. Salt River Val. C. Co., 7 Ariz. 376, 65 P. 332 ('01), and cases cited in note 30, §117.

(17) Wheeler v. Northern Colo. Irr. Co., 10 Colo. 582, 17 P. 487 ('87). Statutes, *post*, Part X.

(18) Golden C. Co. v. Bright, 8 Colo. 144, 6 P. 142 ('84); Wheeler v. Northern Colo. Irr. Co., 10 Colo. 582, 17 P. 487 ('87).

(19) *Post*, §117.

(20) Combs v. Agri. D. Co., 17 Colo. 146, 28 P. 966 ('92); *ante*, §§96, 97.

(21) *Ante*, §45.

tions diverting and carrying water for hire and "sale"(22) take no part in the actual application of the water to a beneficial use. This application is made by the landowner or occupant, called the consumer, (23) and in many instances if not all the consumer has no interest whatsoever in the ditch or canal, nor in its profits or management. The carrier's diversion, therefore, must unite with the consumer's use in order that there may be a complete appropriation within the meaning of the term. (24)

This is also the holding of the supreme court of Arizona. (25) In this territory the court holds that the water right is an appurtenance to the land. The statutes make the ownership and possession of lands essential to a valid appropriation of public water, and therefore the appropriation is made by the consumer or user through the agency of the carrier. (26)

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(22) *Post*, §117.

(23) *Post*, §118.

(24) Wheeler v. Northern Colo. Irr. Co., 10 Colo. 582, 17 P. 487 ('87); Farmers' Highline C. & Res. Co. v. Southworth, 13 Colo. 111, 21 P. 1028 ('89); Combs v. Agricultural D. Co., 17 Colo. 146, 28 P. 966 ('92); Wyatt v. Larimer and Weld Irr. Co., 18 Colo. 298, 33 P. 144 ('93), reversing 1 Colo. App. 480, 29 P. 906 ('92). In the case of Nevada Ditch Co. v. Bennett, 30 Ore. 59, 45 P. 472 ('96), the court discusses the Colorado decisions relating to appropriations by companies for the purpose of "sale" or "rental," and points out that they are governed by the construction of the Colorado constitution to the effect that the appropriation of water consists of two acts: first, a diversion; and second, the application thereof to a beneficial use, and that the latter is declared the essential act. In Oregon it is held that a third element is essential to a valid appropriation, consisting of an *intent*, which, by the nature of things, is peculiarly the act of the appropriator, and which must precede all others in the process of appropriation. "It would seem," says the court, "that he who designed the scheme and made the diversion was the principal, rather than the user who applies the result of the former's labor to his beneficial purpose." The court declined to say who would be the owner of the appropriation, leaving it to be inferred that the "principal" would own and control it. The theory of the Colorado decisions is followed in Albuquerque Land & Irr. Co. v. Guiterrez, 10 N. M. 177, 61 P. 357 ('00).

(25) Slosser v. Salt Riv. Val. C. Co., 7 Ariz. 376, 65 P. 332 ('01); Gould v. Maricopa C. Co., — Ariz. —, 76 P. 600 ('04); reaffirmed, Salt Riv. Val. C. Co. v. Nelssen, — Ariz. —, 85 P. 117 ('06).

(26) See *ante*, §§42, 45.

CHAPTER 20.

RELATION OF CARRIER, CONSUMER AND PUBLIC.

§ 117. "Selling" and "Renting."

We have seen that according to the better reasoning and the weight of authority, (27) the ownership of the appropriation is in the consumer, who by his application of the water to a beneficial use, completes the appropriation, (28) It is, therefore, generally accepted and held, at least in Colorado, New Mexico and Arizona, that the company, by its diversion of the water from the natural stream and the carrying of the same in its canal, does not make nor own the appropriation. The company does, however, own the right to run or conduct through its canal, a certain quantity of water. (29) It can, therefore, readily be seen that the use of the terms "selling" and "renting" water is a misapplication. The company owning no appropriation has no water which it can "sell" or "rent." By the use of these terms, therefore, it is meant that the carrier sells to the consumer a right of way through its ditch or canal to run a specified quantity of water, or in other words, its carrying service. (30) In the case of Wheeler v. Northern Colo. Irr. Co., Helm, J., said:

"A cursory reading of the statutes might convey the impression that the legislature regarded the carrier as possessing a salable interest in this water, and the constitutional phrase (Art. 16, §8) 'to be charged for the use of water,' relating to the carrier's compensation, might at first glance seem to recognize a like ownership in such *use*. But construing all the

(27) *Ante*, §116.
(28) *Id.*
(29) Cases cited in next note.
(30) Wheeler v. Northern Colo. Irr. Co., 10 Colo. 582, 17 P. 487 ('87); Helm, J., in Farmers' Highline C. & Res. Co. v. Southworth, 13 Colo. 111, 21 P. 1028 ('89); Wyatt v. Larimer and Weld Irr. Co., 18 Colo. 298, 33 P. 144 ('93), reversing 1 Colo. App. 480, 29 P. 906 ('92); Albuquerque Land & Irr. Co. v. Gutierrez, 10 N. M. 177, 61 P. 357 ('00); Slosser v. Salt River Val. C. Co., 7 Ariz. 376, 65 P. 332 ('01); Gould v. Maricopa C. Co., — Ariz. —, 76 P. 600 ('04); Salt River Canal Co. v. Nelssen, — Ariz. —, 85 P. 117 ('06)

provisions of that instrument bearing upon the subject *in pari materia*, the correctness of both these inferences must be denied. * * * It requires no citation of authority to show that the words "purchase" and "sale," together with other words of like import, used in this connection by the legislature, must receive a corresponding interpretation." (31)

Chief Justice Beck, in the same case, referring to the above mentioned constitutional phrase "to be charged for the use of water," says:

"It is not as objectionable as the phraseology of the statutes, which includes such expressions as 'selling water,' 'furnishing water for sale,' 'purchasing water' and the like." (32)

The Colorado court of appeals, in the case of Wyatt v. Larimer and Weld Irrigation Co., (33) took the opposite position and held that the company, by the diversion and delivery of the water, satisfied the requirements of the constitution as to the elements of an appropriation, and by its own act completed the appropriation, and therefore became the "proprietor" or "owner" of the water diverted, and "as such, may sell, transfer and deliver it to be used by those who require it for irrigation."

This case was reversed by the supreme court, (34) and the ruling in Wheeler v. Northern Colorado Irrigation Co., (35) mentioned above, was re-affirmed and followed. Goddard, J., of the supreme court, said:

"We are unable to see wherein the discussion by the learned judge writing the majority opinion touching the constitutional status of irrigation companies in this state was essential to the decisions of the questions involved in the case. But, inasmuch as the views expressed in that opinion are so at variance with the numerous decisions of this court, we feel impelled to express our disapproval thereof, and our adherence to the doctrine heretofore announced by

(31) Wheeler v. Northern Colo. Irr. Co., 10 Colo. 582, 588-9, 17 P. 487 ('87), 3 Am. St. 603.
(32) *Id.*, 598.
(33) 1 Colo. App. 480, 29 P. 906 ('92).
(34) 18 Colo. 298, 33 P. 144 ('93).
(35) Note 30, *supra*.

this court in relation to the status of canal companies organized for the purpose of carrying water for general purposes of irrigation. We adhere to the doctrine that such a canal company is not the proprietor of the water diverted by it, but that 'it must be regarded as an intermediate agency existing for the purpose of aiding consumers in the exercise of their constitutional rights, as well as a private enterprise prosecuted for the benefit of its owners.' " (36)

§ 118. Relation to Consumer and Public—"Carrier," "Consumer" and "Co-consumer."

A corporation organized for the purpose of conducting water for "sale" (37) or hire, (37) to be used in irrigation, is by the very nature of its purpose dealing, from the standpoint of a monopoly, with that portion of the public owning or occupying lands under or in the vicinity of its canal system, and therefore the public has an interest in seeing that its dealings with its consumers are upon a fair and reasonable basis. (38) As was said by Helm, J., in Wheeler v. Northern Colo. Irr. Co., 10 Colo. 582, 17 P. 487 ('87):

"The Colorado doctrines of ownership and appropriation (as declared in the constitution, statutes and decisions) necessarily give the carrier of water an exceptional status; a status differing in some particulars from that of the ordinary common carrier. * * * Under the constitution, as I understand it, the carrier is at least a *quasi* public servant or agent. It is not in the attitude of a private individual contracting for the sale or use of his private property. It exists largely for the benefit of others; being engaged in the business of transporting, for hire, water owned by the public to the people owning the right to its use. It is permitted to acquire certain rights as against those subsequently diverting water from the same natural stream. It may exercise the power of eminent domain. Its business is affirmatively sanc-

(36) Wyatt v. Larimer and Weld Irr. Co., 18 Colo. 298, 308, 33 P. 144 ('93).

(37) *Ante*, §117.

(38) White v. Farmers' Highline C. & R. Co., 22 Colo. 191, 197, 43 P. 1028 ('96). As to public authorities fixing water rates, see *ante*, §§93-97.

tioned and its profits or emoluments are fairly guaranteed. But in consideration of this express recognition, together with the privileges and protection thus given, it is, for the public good, charged with certain duties and subjected to a reasonable control." (39)

Such a corporation is charged with what the decisions term a public duty or trust. (40) In classing irrigation or canal companies as *quasi* public servants and common carriers the courts have but followed the rule laid down with respect to gas, (41) telephone, (42) and water companies engaged in furnishing water to the inhabitants of municipalities. (43) By statute in Colorado and in most of the arid and semi-arid states, it is provided that the water shall be under the control of the ditch company, acting through a superintendent or other officer whose duties are prescribed, (44) and the statute does not

(39) Canal companies are *quasi* public servants and common carriers, see Wyatt v. Larimer and Weld Irr. Co., 18 Colo. 298, 308, 33 P. 144 ('93), reversing 1 Colo. App. 48, 29 P. 906 ('92); Junction Cr. & N. Durango Domestic & Irr. D. Co. v. City of Durango, 21 Colo. 194, 196, 40 P. 356-7 ('95); Farmers' Independent D. Co. v. Agricultural D. Co., 22 Colo. 513, 521, 45 P. 444 ('96); Lanning v. Osborne [Cal.], 76 F. 319 ('96); Atlantic Trust Co. v. Woodbridge Canal & Irr. Co. [Cal.], 79 F. 39 ('97); San Joaquin & K. R. Canal & Irr. Co. v. Stanislaus County [Cal.], 90 F. 516 ('98); Prescott Irr. Co. v. Flathers, 20 Wash. 454, 55 P. 635 ('99); Albuquerque Land & Irr. Co. v. Guiterrez, 10 N. M. 177, 61 P. 357 ('00); Candelaria v. Vallejos, — N. M. —, 81 P. 589 ('05); Farmers' Irr. Dist. v. Frank, — Neb. —, 100 N. W. 286 ('04); Gould v. Maricopa Canal Co., — Ariz. —, 76 P. 598 ('04); Colo. Canal Co. v. McFarland & Southwell, — Tex. —, 94 S. W. 400 ('06).

(40) Price v. Riverside Land & Irr. Co., 56 Cal. 431, 433 ('80); Cozzens v. N. Fork Ditch Co., — Cal. —, 84 P. 342 ('06); Junction Cr. & N. Durango Domestic & Irr. Ditch Co. v. City of Durango, 21 Colo. 194, 196, 40 P. 356 ('95); Farmers' Ind. Ditch Co. v. Agricultural D. Co., 22 Colo. 513, 521, 45 P. 444 ('96).

(41) Shepard v. Milwaukee Gas Light Co., 6 Wis. 539, 547-9 ('58).

(42) State v. Kinloch, 93 Mo. App. 349, 67 S. W. 684, 686-8 ('02).

(43) Wood v. City of Auburn, 87 Me. 287, 32 Atl. 906, 907-8 ('95); City of Danville v. Danville Water Co., 178 Ill. 299, 53 N. E. 118, 122-3 ('99). See, also, *ante*, §95, note 89.

(44) 1 Mills' Ann. Stat., §2289. Statutes, *post*, Part X. White v. Farmers' Highline C. & R. Co., 22 Colo. 191, 196, 43 P. 1028 ('96).

permit the consumer to take the water himself under his contract of carriage, even though the company is bound to supply it. (45) The statute controls notwithstanding it was enacted after the contract was made. (45) In the early cases, wherein the rights of irrigation corporations were involved, the adjustment of priorities and the differences between consumers were the principal questions. But it was soon recognized that the status of the carrier and its relations to the consumer were vital questions, and they immediately commanded thoughtful and earnest attention. (46) In all of the cases the terms "carrier" and "consumer" are used as meaning, respectively, the canal company and the tiller of the soil, and Mr. Justice Helm used the word "co-consumer" to designate those consumers taking water from the same artificial stream. (47)

CHAPTER 21.

CONTRACTS.

§ 119. Contracts of or with the Company.

The irrigation companies generally furnish the water to the consumers under written contracts, which have been held to be subject to the usual rules that apply to the construction of ordinary contracts. (48)

(45) White v. Farmers' Highline C. & R. Co., 22 Colo. 191, 195-6, 43 P. 1028 ('96). As to the right to take water without knowledge of the ditch company, see Coffin v. Left H. D. Co., 6 Colo. 443 ('82).

(46) Wheeler v. Northern Colo. Irr. Co., 10 Colo. 582, 586, 17 P. 487 ('87).

(47) *Id.* Farmers' Highline C. & Res. Co. v. Southworth, 13 Colo. 111, 119, 21 P. 1030 ('89).

(48) Fresno Canal & Irr. Co. v. Dunbar, 80 Cal. 530, 22 P. 275 ('89); San Diego Flume Co. v. Chase, 87 Cal. 561, 25 P. 756, 26 P. 825 ('91); Russ L. & M. Co. v. Muscupiabe L. & W. Co., 120 Cal. 521, 52 P. 995 ('98); Hewitt v. San Jacinto, etc., Dist., 124 Cal. 186, 56 P. 893 ('99); San Diego F. Co. v. Souther [Cal.], 90 Fed. 164 ('98); Sample v. Fresno, etc., Co., 129 Cal. 222, 61 P. 1085 ('00); Hargrave v. Hall, 3 Ariz. 252, 73 P. 400 ('91); Wyatt v. Larimer, etc., Co., 18 Colo. 298, 33 P. 144 ('93); Wright v. Platte, etc., Co., 27 Colo. 322, 61 P. 603 ('00); Brighton, etc., Co. v. Little, 14 Utah 42, 46 P. 268 ('96); Western, etc., Co. v. Chapman, 8 Kan. App. 778, 59 P. 1098 ('99); Moore-Cortes C. Co. v. Gyle, 36 Tex. Civ. App. 442, 82 S. W. 350 ('04).

The true intent and meaning of a contract entered into between the company and the consumer must be determined by the terms used, read in the light of the circumstances surrounding the parties at the time of its execution, also the subject-matter of the contract, and the purposes and objects to be accomplished by its execution. (49) Where the contract is written on the printed blanks prepared by the company, terms of doubtful import will be construed most strongly against the company. (50) Where a contract provides that upon failure to pay the annual rental the consumer "forfeits and relinquishes all rights and claims whatsoever in and to the use of said water from said ditch," it will be held to apply only to the rights, if any, given by the contract, and not to waive the consumer's statutory right to obtain water from the ditch independent of express contract, under an order fixing rates made by the board of county commissioners. (51) A provision in the same contract, whereby the company agreed to furnish the consumer with a certain quantity of water "year after year," so long as he should pay the annual rental therefor, was held to be a mere option which could be terminated by the consumer at the end of any year, but that a forfeiture of the consideration, if any, advanced for the option, followed the exercise of the election to terminate. (52) It was also held that the causing of the board of county commissioners to fix a rate for water from the company's ditch, and declining to pay more, was a termination of such

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(49) Wyatt v. Larimer and Weld Irr. Co., 18 Colo. 298, 33 P. 144 ('93). Under a contract providing that the purchaser should pay his proportionate share, each year, of the expense of maintaining and repairing the canal, his liability is only for maintenance and repairing of the canal as it was at the time of the contract, and does not include extensions made thereafter. Riverside Heights W. Co. v. Riverside Tr. Co., — Cal. —, 83 P. 1003 ('06).

(50) *Id.* Contract under which a party was entitled to water forever is set out in People v. Farmers' Highline C. & R. Co., 25 Colo. 202, 54 P. 626 ('98).

(51) South Boulder, etc., Co. v. Marfell, 15 Colo. 302, 25 P. 504 ('90).

(52) *Id.*

contract, though the contract was not returned or canceled, (53) and that under the statute, even though the contract was forfeited, the consumer still could require the company to furnish water from its ditch at the commissioners' rates. In the case of Colorado Canal Co. v. McFarland and Southwell, (54) the Texas court of civil appeals held, that where the officers of an irrigation company did not require the written notice stipulated for in the written contract, but continuously furnished water when verbally requested to do so, and told the consumers that such written notice was not necessary, and the consumers relied and acted upon such conduct and representation, the company was estopped to deny a waiver of the provisions of the written contract.

§ 120. Contracts Against Public Policy or Statute.

The term "public policy" has never been defined by the courts, but has been left loose and free of definition like the word "fraud." Whatever conflicts with the morals of the times and contravenes any established interest of society is void as against public policy. (55) As is the case with ordinary contracts, a contract between an irrigation company and its consumer, which is against public policy or statute, will not be enforced. (56) One illustration of this class of contracts has been discussed under the title "Anti-Royalty Act." (57) A contract which authorized the consumer to take all the water to which he was entitled, should the company at any time fail or refuse to furnish water, was held to be against public policy, inoperative and void, and the consumer was restrained from attempting to exercise such right. (58) A contract whereby the company undertakes to exact a bonus or royalty as a condition precedent to furnish-

(53) *Id.*
(54) — Tex. Civ. App. —, 94 S. W. 400 ('06).
(55) Pueblo & Ark. Val. R. R. Co. v. Taylor, 6 Colo. 1, at pp. 8-10 ('81).
(56) See *post*, note 58.
(57) *Ante*, §95.
(58) Farmers' Highline C. & R. Co. v. White, 5 Colo. App. 1, 31 P. 345 ('94).

ing the water, is unlawful. (59) It was suggested, however, that such a contract was not illegal *per se*, and unless the consumer objected, his rights might be waived,—that a voluntary contract as to these matters might be binding upon him. (60) Contracts whereby the irrigation company agrees to furnish more water than it has the ability to furnish are illegal; and the company will be enjoined, at the instance of those holding prior water rights, (61) from selling water in excess of the capacity of its ditch, and from compelling them to pro-rate with the purchasers of such excess rights. (62) The federal courts recognize as binding upon them the decisions of the state courts as to the validity of contracts between irrigation companies and consumers. (63)

§ 121. "Estimated Capacity" of Ditch.

Many irrigation companies, particularly in Colorado, have "sold perpetual water rights," (64) giving the purchaser a deed (65) therefor. In these contracts it has generally been provided that when the com-

(59) Wheeler v. Northern Colo. Irr. Co., 10 Colo. 582, 17 P. 487 ('87). In this case the company tried to exact a payment of $10 per acre as an absolute condition precedent to the right to use water for the current irrigation season, claiming that it was an advance payment of part of the transportation charge for the remaining years of its corporate life. Held illegal, unreasonable and oppressive. Northern Colo. Irr. Co. v. Richards, 22 Colo. 450, 45 P. 423 ('96). For a discussion of this question with other citations, see *ante*, §95.

(60) Wheeler v. Northern Colo. Irr. Co., 10 Colo. 582, 17 P. 487 ('87). This decision was rendered before the "Anti-Royalty Act" was passed. See *ante*, §95. This question should be considered, however, with reference to duress. Adams v. Schiffer, 11 Colo. 15, 30 ('87), 17 P. 21, 7 Am. St. 202.

(61) *Post*, §129.

(62) Farmers' Highline C. & Res. Co. v. Southworth, 13 Colo. 111, 21 P. 1028 ('89); Wyatt v. Larimer, etc., Co., 18 Colo. 298, 33 P. 144 ('93); Lanning v. Osborne, 76 Fed. 319 ('96). See next section as to "estimated capacity" of ditch. Also *ante*, §86, as to pro-rating.

(63) San Diego F. Co. v. Souther, 90 Fed. 164 ('98). The court was discussing the power of a flume company to contract for delivery of water to consumers, and the statutes of California relating thereto.

(64) *Post*, §129.

(65) This form of contract was initiated soon after the decision in what is known as the "Anti-Royalty Case," Wheeler v. Northern Colo. Irr. Co., 10 Colo. 582, 17 P. 487 ('87); *ante*, §117.

pany has sold water rights (66) equal to the "estimated capacity" of the ditch or canal, no further rights shall be sold, and the consumers shall organize a new company to which the original company shall convey all its right, title and interest in the ditch or canal. The purpose of the contract and deed in giving an interest in the ditch or canal itself contingent upon selling its "estimated capacity," seems to be, at least in Colorado where this form of contract originated, to avoid the "Anti-Royalty Act." (67) The effect of the contract is to give the canal company a certain stipulated sum per acre, which is a condition precedent to the right of the consumer to pay the company the annual charge for carrying the water to his land. It is said, however, that this condition precedent is not an illegal exaction or "royalty," because it rests upon a legal consideration, to wit, the consumers' contingent interest in the canal or ditch. Where this contingency is not clearly too remote to ever be realized, it undoubtedly is a valuable consideration and places the water deed and contract beyond the reach of the "Anti-Royalty Act." (68) But it is not difficult to conceive of such physical conditions surrounding certain irrigation enterprises as to make the contingency of selling out its "estimated capacity" a mere delusion and a snare. In such a case the form of a water deed and contract would not suffice to evade the statute. Thus far the "Anti-Royalty Act" has received no interpretation by the Colorado courts.(68*a*)

Under the "estimated capacity" clause many companies in Colorado sought to continue selling rights beyond the amount of water they could obtain from the stream, and in some cases beyond the carrying capacity of the canal. The supreme court, in construing the meaning of the words "estimated capacity," has repeatedly held that they mean not a fictitious capacity based upon pro-rating or rotating

(66) Blakeley v. Ft. Lyon Canal Co., 31 Colo. 224, 230, 73 P. 249 ('03).
(67) See *ante*, §95.
(68) *Id.*
(68*a*) It is briefly referred to in Northern Colo. Irr. Co. v. Richards, 22 Colo. 450, 456, 45 P. 423 ('96).

the water, but the ability of the canal to supply or deliver water, based not only on the physical capacity, but the volume of its decreed priorities in connection with the probability of obtaining water from the stream supplying them, during the irrigating season.(69) When a canal company has sold its "estimated capacity," the purchasers of water rights (70) are entitled to enforce, by a proper action, the conveyance of the canal or ditch to the new company, (71) and the title to the ditch or canal then vests in the new company, as a vendee, and not as a purchaser; and it does not assume any of the obligations of the old company, nor can it be compelled to deliver water to those purchasers of water rights in excess of the "estimated capacity," nor to return them their money. (72) They should have ascertained the ability of the canal to deliver water before purchasing, and the consumers under the ditch, who constitute the new company, are not guilty of laches in failing to stop the old company from selling excess water rights. (72) In a recent case, however, it was held that when the contracts and deeds were executed to excess rights, the holders of valid rights had an immediate right of action to set aside such deeds and cancel the contracts, and that the statute of limitations ran from that time. (73) In an action to enforce a conveyance from the old to the new company, the court appointed a receiver, who wound up the affairs of the old company and organized the new company, and in the settlement the court ordered the new company to pay certain debts, which it failed to do, then the court reappointed the receiver, who arranged for the payment of these debts, and it was held that

(69) Blakeley v. Ft. Lyon C. Co., 31 Colo. 224, 73 P. 249 ('03); Wyatt v. Larimer and Weld Irr. Co., 18 Colo. 298, 33 P. 144 ('93).

(70) *Post*, §129.

(71) La Junta & Lamar C. Co. v. Hess, 6 Colo. App. 497, 42 P. 50 ('95).

(72) The "Anti-Royalty Act" ought to be consulted by those purchasers deluded into buying beyond the estimated capacity of the canal or ditch. Blakeley v. Ft. Lyon C. Co., 31 Colo. 224, 73 P. 249 ('03).

(73) Patterson v. Ft. Lyon Canal Co., 35 Colo. —, 84 P. 807 ('06).

neither the new nor the old company could object. (74) It has also been held that so long as the irrigation company continues to sell water rights, (75) and to retain an interest in the canal or ditch and does not turn the same over to the new company, the property is not exempt from taxation under the Colorado statute. (76)

CHAPTER 22.

RULES AND REGULATIONS.

§ 122. Power to Make Reasonable Rules.

All irrigation companies may make reasonable rules and regulations to be observed by themselves, as well as by the consumer, in the conduct of their business. (77) But all unreasonable rules, regulations or demands that operate to withhold or prevent the exercise of the constitutional right by the consumer of water, must be held illegal, although there be no express legislative declaration on the subject. (78) The company has imposed upon it the duty of delivering water to the consumers on tender of the regular rates, even though the applicant be in default for a previous year or years. (79) Rules and regulations which require the payment of such arrearage are void for want of consideration. (79) A canal

(74) La Junta & Lamar Co. v. Hess, 31 Colo. 1, 71 P. 415 ('03).

(75) *Post*, §129.

(76) Murray v. Board Co. Com'rs Montrose Co., 28 Colo. 427, 65 P. 26 ('01); 1 Mills' Ann. Stat., §2397. 2 *Id.*, §3766, and *post*, §167. See, also, Empire L. & C. Co. v. Board Co. Com'rs Rio Grande Co., 21 Colo. 244, 40 P. 499 ('95).

(77) Golden C. Co. v. Bright, 8 Colo. 144, 6 P. 142 ('88); White v. Farmers' Highline C. & R. Co., 22 Colo. 191, 43 P. 1028 ('96).

(78) Wheeler v. Northern Colo. Irr. Co., 10 Colo. 582, 17 P. 487 ('88); *ante*, §95. See cases cited, *ante*, §95, note 89. The power of irrigation companies to make rules and regulations is very fully discussed in the cases of Slosser v. Salt River Canal Co., 7 Ariz. 376, 65 P. 332 ('01); and Gould v. Maricopa Canal Co., — Ariz. —, 76 P. 598 ('04).

(79) Crow v. San Joaquin & K. R. C. & Irr. Co., 130 Cal. 309, 62 P. 562 ('00); rehearing denied, *Id.* 1058. In this case Beatty, J., filed a dissenting opinion, holding that a party can agree in advance to waive a statutory right, and that in this case the plaintiff did so.

company must furnish water to those who have used it before. Were it permitted to make rules and regulations changing its consumers, they would be at its mercy, and it could ruthlessly destroy the crops of the season as well as the vineyards and orchards, the result of many seasons' industry. (80) The supreme court of Arizona, in the case of Slosser v. Salt River Val. C. Co., (81) held that when a company undertakes to divert and carry water for the use of consumers generally, and not *exclusively* for its shareholders, it becomes a public agency and cannot make any rules discriminating against any consumer nor giving any preference other than with due regard to priority of appropriation. This case was approved by the court in the later case of Gould v. Maricopa Canal Co., (82) and again in the case of Salt River Canal Co. v. Nelssen. (83) The courts are but applying the rule laid down in the decisions affecting the right of public service corporations, such as water, gas, telephone and railroad companies. (84) The supreme court of Wisconsin, as long ago as 1858, announced the doctrine that the rules and regulations of a gas company must be reasonable, just and lawful, not capricious, arbitrary, oppressive or unreasonable. That such a company could not shut off service because of abuse or fraud, but must resort to the courts. That, if the company were chartered to sell bread, it could not sell it only to those it should capriciously select. (85) In the case of the Highland Ditch Company v. Mumford (86) the rules and regulations are set out in full.

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(80) Merrill v. Southside Irr. Co., 112 Cal. 426, 44 P. 720, 722-3 ('96).

(81) 7 Ariz. 376, 65 P. 332, 339 ('01).

(82) — Ariz. —, 76 P. 600 ('04).

(83) — Ariz. —, 85 P. 117, 118 ('06). See, also, Eaton v. Larimer and Weld Irr. Co., 35 Colo. —, 83 P. 627 ('05).

(84) For cases affecting these different classes of corporations, see *supra*, §§95-97.

(85) Shepard v. Milwaukee Gas L. Co., 6 Wis. 539, 547-9 ('58). For telephone company rules, see Gwynn v. Citizens' Teleph. Co. [So. Car.], 67 L. R. A. 111 ('04).

(86) 5 Colo. 325 ('80).

§ 123. Discussion of Specific Rules.

By the statutes of the various states and territories the consumer is guaranteed certain rights, among them being the right to "buy" (87) or "rent" (87) water from the irrigation company when it has any water in its canal not otherwise disposed of; (88) also the right to continue using such water from the company's ditch or canal, (89) and in addition the rights guaranteed by the constitution and statutes as to priority of appropriation. Whenever the irrigation company enacts rules and regulations which undertake to invade any of these rights, the consumer cannot be required to recognize and acknowledge the equity of the same. (90) Where companies have by rule fixed a time within which applications to "rent" (91) water must be filed, it has been held that notwithstanding the application was not made within such time, nevertheless, if the company has any water undisposed of, and is free from conflicting obligations, the statutory right to "purchase" (91) is not forfeited by the rule. (92) Such companies may make rules requiring consumers to pay the "rental" (93) therefor in advance. If it fails to do so it cannot refuse to furnish water another season until the arrearage is paid, but has an action against the consumer for the debt. (94) The first purchaser of a water right (95) from an irrigation company, that by contract agreed to furnish him water for 160 acres of land for all time, is not bound by the same rules and regulations as those who purchase subsequently. (96)

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(87) *Ante*, §117.
(88) *Ante*, §§115-118.
(89) *Ante*, §97.
(90) Golden Canal Co. v. Bright, 8 Colo. 144, 6 P. 142 ('84); Combs v. Agricultural D. Co., 17 Colo. 146, 28 P. 966 ('92); Wilterding v. Green, 4 Ida. 773, 45 P. 134 ('96); see Colo. Canal Co. v. Mayes, — Tex. Civ. App.—, 85 S. W. 448 ('05).
(91) *Ante*, §117.
(92) Golden Canal Co. v. Bright, 8 Colo. 144, 6 P. 142 ('84).
(93) *Ante*, §117; *post*, §124.
(94) Shelby v. Farmers' Co-op. D. Co., — Ida. —, 80 P. 222 ('05). See *ante*, §§93-97, 122, and *post*, §124.
(95) *Post*, §129.
(96) Hargrave v. Hall, 3 Ariz. 252, 73 P. 400 ('91).

§ 124. Collection of Water Rates, "Rentals," or Carriage Fee.

A canal company may require parties using the water to pay the water rate, "rental" or carriage fee in advance, and in Idaho it was held that should the company neglect to do so, its remedy is by an action at law and not by a rule refusing to furnish water until the arrearages are paid. (97) The question whether or not a carrier of water may refuse to deliver water until the carriage fees of previous years have been paid, has not been directly decided in Colorado. In the case of Eq. Sec. Co. v. Montrose & Delta C. Co., (98) the plaintiff pleaded that the defendant refused to deliver water for the season of 1899, until arrearages for previous years were paid. The case was decided upon appeal on a question of variance between the pleading, and proof of damages, but it may well be inferred from this case that the Colorado courts would not recognize such a ground for refusal.

On the contrary a city ordinance, providing that water and gas may be shut off for failure to pay therefor, and that they shall not be again supplied to the premises until the arrearages have been paid, has been held reasonable and sustained even though the premises have passed into other hands. (99)

CHAPTER 23.

DITCH STOCK.

§ 125. Ditch Stock is Personal Property—Sheriff's Deed.

There is a distinction between a water right, (100) and shares of stock in a ditch company. A real estate owner or occupant may have the right to use water for irrigation or some other beneficial purpose, with-

(97) Shelby v. Farmers' Co-op. D. Co., — Ida. —, 80 P. 222 ('05). See *ante*, §123, §§95-97.
(98) 20 Colo. App. 465, 79 P. 747 ('05).
(99) Girard Ins. Co. v. City of Phila., 88 Pa. St. 393; Com. *ex rel.* Trustees v. City of Phila., 132 Pa. St. 288, 19 Atl. 136 ('90).
(100) *Post*, §129.

out owning any interest in the canal or ditch, also without owning any ditch stock that represents the canal or ditch, while a stockholder in the ditch company owning or operating the canal or ditch, having no land to irrigate, mill or other plant to operate, may be without the right to use any water for a beneficial purpose. (101) The water right belongs to the land and is regarded as real property, (102) while the capital stock in a ditch company is personal property, subject to execution and sale in the manner pointed out by the statute, the same as other personal property. (103) By statute in Colorado it is provided that any corporation owning any ditch or canal for conveying, or reservoir for storing, water for irrigation purposes, and the capital stock being fully subscribed and paid up, and the company having no source of income to keep the ditch or reservoir in repair, such corporation may levy an assessment upon the capital stock for that purpose. (104) This statute is discussed and a levy of an assessment for the purpose of paying the operating expenses of the corporation was upheld in the case of Callahan v. Chilcott Ditch Co. (105)

§ 126. Forfeiture Under Ditch Company Rules.

A rule adopted by a ditch company providing that one who fails to pay for the carriage of water for two successive years shall be deemed to have forfeited his right to demand water, does not work a forfeiture of the right in the absence of affirmative action by the company. (106)

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(101) First Nat. Bank v. Hastings, 7 Colo. App. 129, 42 P. 692 ('95).

(102) *Id.* Talcott v. Mastin, 20 Colo. App. 488, 79 P. 973 ('05). But a sheriff's deed does not convey the water right where it is not levied upon and not specifically mentioned. It is an involuntary conveyance and the sheriff's intention cannot bind the owner. Cooper v. Shannon, 35 Colo. —, 85 P. 175 ('06); *post*, §130.

(103) Struby-Estabrook Merc. Co. v. Davis, 18 Colo. 93, 31 P. 495 ('92); Talcott v. Mastin, 20 Colo. App. 488, 79 P. 973 ('05); George v. Robinson, 23 Utah 79, 63 P. 819 ('01).

(104) 1 Mills' Ann. Stat., §569.

(105) 35 Colo. —, 86 P. 123 ('06).

(106) Cooper v. Shannon, 35 Colo. —, 85 P. 175 ('06).

§ 127. Carrier and Mutual Companies—Stock Representing Water.

Irrigation companies, organized for the purpose of "selling" (107) or "renting" (107) the water to persons along the line of their ditch or canal, which we designate as "carrier" or "common carrier" companies, are fundamentally different from those companies organized for the purpose of furnishing water to be beneficially used exclusively by the members of the company, and which we may designate as "mutual companies." In the former, as we have seen, (108) the stock or shares carry no rights whatever to water, while in the latter the water carried by the ditch or canal is represented by the shares of stock. In other words, the shares of stock are made a convenient medium or method for dividing the water between those who build or pay for the ditch owned by the company, providing, of course, they actually use the water. The former carrier or company is a corporation for profit, while the latter is purely a mutual corporation for the sole purpose of conveying water to its shareholders. (109) Each share of stock in a mutual company in respect to the use of water to which it entitles its holder, is equal to every other share. (110) The holder is entitled to the proportion of water carried through the ditch or canal that the amount of his stock bears to the whole amount of the stock of the company (111) and the distribution of the water in this manner, when it is actually used for a beneficial purpose, does not seem to conflict with the "better right" of prior appropriators. (112) In these mutual companies the capital stock represents the interest of the party in the ditch, also his right to use the water; and a transfer of such stock is also

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(107) *Ante*, §117.
(108) *Ante*, §125.
(109) Murray v. Board Co. Com'rs Montrose Co., 28 Colo. 427, 65 P. 26 ('01).
(110) Rocky Ford C. Res. L. L. & Tr. Co. v. Simpson, 5 Colo. App. 30, 36 P. 638 ('94).
(111) *Id.*
(112) Oppenlander v. Left-Hand Ditch Co., 18 Colo. 142, 31 P. 854 ('92).

a transfer of both an interest in the ditch and a priority to the use of water where the water has actually been used for a beneficial purpose, to the amount of the stock so transferred, (113) but the transferee is not entitled to receive any of the water until the transfer is made on the books of the company. If he takes the water by force he will be liable as a trespasser, notwithstanding his ownership of stock. (114) When shares of stock representing the water right are transferred, as just mentioned, the transfer carries the water right, (115) if one has been initiated by the actual use of the water represented thereby and may operate to sever the water right from the land of the transferer. (116) Such shares of stock are not appurtenant to the land of the owner of the shares, and a conveyance of the land does not carry with it the shares of stock. (117) As was said by Mr. Justice Elliott in the case of Combs v. Agricultural Ditch Co.: (118)

"The ownership of a prior right to the use of water is essentially different from the ownership of stock in an irrigating company. The ownership of the stock, like the title to other property, may be acquired by descent or purchase; the ownership of the prior right can be acquired originally only by the actual beneficial use of the water. The very birth and life of a prior right to the use of water is actual

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(113) Cache La Poudre Irr. Co. v. Larimer and Weld Irr. Co., 25 Colo. 144, 53 P. 318 ('98); Supply D. Co. v. Elliott, 10 Colo. 327, 15 P. 691 ('87); Spurgeon v. Santa Ana, etc., Co., 120 Cal. 71, 52 P. 140 ('98); George v. Robinson, 23 Utah 79, 63 P. 819 ('01).

(114) Supply Ditch Co. v. Elliott, 10 Colo. 327, 15 P. 691 ('87). As to injury caused by transfer of stock and use of water on other lands, see Cache La Poudre Irr. Co. v. Larimer and Weld Irr. Co., 25 Colo. 144, 53 P. 318 ('98). But see, also, Grand Valley Irr. Co. v. Lesher, 28 Colo. 273, 65 P. 44 ('01); Talcott v. Mastin, 20 Colo. App. 488, 79 P. 973 ('05).

(115) *Post*, §129.

(116) Oppenlander v. Left-Hand Ditch Co., 18 Colo. 142, 31 P. 854 ('92).

(117) Wells v. Price, 6 Ida. 490, 56 P. 266 ('99); Struby-Estabrook M. Co. v. Davis, 18 Colo. 93, 31 P. 495 ('92). See, also, Snyder v. Murdock, 20 Utah 419, 59 P. 91 ('99).

(118) 17 Colo. 146, 28 P. 966 ('92).

user. A stockholder in an irrigating company who makes an actual application of water from the company's ditch to beneficial use may, by means of such use, acquire a prior right thereto; but his title to the stock without such use gives him no title to the priority. He may transfer his stock to whom he will, but he can only transfer his priority to some one who will continue to use the water."

In other words, the court held that the ownership of stock in an irrigating company does not *per se* carry the right to use water. This right must be acquired by beneficial use.

PART VI.

PROPERTY AND TITLE, CONTRACTS, SALES AND CONVEYANCES.

CHAPTER 24.

PROPERTY AND TITLE.

§ 128. Property Values in Water.

Throughout the arid and semi-arid West the water in the various streams acquires a value unknown in moister climates. (1) Instead of being a mere incident to the soil, it rises, when appropriated, to the dignity of a distinct usufructuary estate or right of property. (2) These property rights are as important, as valuable and as extensive as the uses to which they are applied, and consist as well in the priority of appropriation as in the amount. (3) In fact, in so far as irrigation in the arid states is concerned, the water furnishes by far the greater part of the value of the land. Without it, these broad acres, now fertile and productive, would be but barren wastes, to be saved, if at all, by the scientific system of "dry farming" that is gaining favor in long-neglected areas of the West.

§ 129. Water Right Defined—Property in Water Rights.

A water right has been defined as a "legal right to use water." (4) The Colorado supreme court has

(1) *Ante*, §40.

(2) Coffin v. Left-Hand Ditch Co., 6 Colo. 443 ('82); City of Denver v. Mayer, 7 Colo. 113, 2 P. 6 ('83); Rominger v. Squires, 9 Colo. 327, 12 P. 213 ('86); Wheeler v. Northern Colo. Irr. Co., 10 Colo. 582, 17 P. 487 ('87); Armstrong v. Larimer Co. D. Co., 1 Colo. App. 49, 27 P. 235 ('91); Cash v. Thornton, 3 Colo. App. 475, 34 P. 268 ('93).

(3) Nichols v. McIntosh, 19 Colo. 22, 34 P. 278 ('93).

(4) Smith v. Denniff, 24 Mont. 20, 60 P. 398 ('00). In City of Helena v. Rogan, 26 Mont. 452, 68 P. 798 ('02), the court, speaking of the definition given in Smith v. Denniff, said: "This

defined a water right acquired through the use of water carried by an irrigation company, as a right to have a certain quantity of water flow through the irrigation company's ditch. as "an easement in the ditch." It is a right annexed to realty, and being a perpetual right, is an incorporeal hereditament descendible by inheritance to its owner's heirs, and hence is a freehold estate. (5)

A water right is property within the constitutional provision that private property shall not be taken or damaged for a public or private use without just compensation. (6) Running water, so long as it continues to flow in its natural course, cannot be the subject of private ownership, (7) except in those states and territories where the doctrine of riparian rights prevails, where it is regarded as a part of the land by or through which it flows. (8) There can be no distinct and separate ownership in the corpus of the water. (9) But the supreme court of California conceded without discussion, in the case of Parks Canal and Min. Co. v. Hoyt, (10) that water which the appropriator has taken from its natural channel and confined in his diverting works may be personal property.

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may be modified to mean, in this case, the right to use water appropriated according to law from the streams of the state for any useful or beneficial purpose." See, also, Hill v. Newman, 5 Cal. 445; La Junta & Lamar C. Co. v. Hess, 6 Colo. App. 497, 506, 42 P. 50 ('95).

(5) Wyatt v. Larimer and Weld Irr. Co., 18 Colo. 298, 307, 33 P. 144 ('93).

(6) Armstrong v. Larimer Co. D. Co., 1 Colo. App. 49, 27 P. 235 ('91); Fisher v. Bountiful City, 21 Utah 29, 59 P. 520 ('99). *Post*, §§159-162.

(7) Dalton v. Bowker, 8 Nev. 190 ('73); Wheeler v. Northern Colo. Irr. Co., 10 Colo. 582, 17 P. 487 ('87).

(8) *Ante*, §§16, 20.

(9) Kidd v. Laird, 15 Cal. 161 ('60); Wheeler v. Northern Colo. Irr. Co., 10 Colo. 582, 17 P. 487 ('87); Bear Lake, etc., Co. v. Ogden City, 8 Utah 494, 33 P. 135 ('93); Norman v. Corbley, 32 Mont. 195, 79 P. 1059 ('05).

(10) 57 Cal. 44 ('80). In Colorado the supreme court says: "We shall presently see that after appropriation the title to this water, *save, perhaps, as to the limited quantity that may be actually flowing in the consumer's ditch or lateral*, remains in the general public; while the paramount right to its use, unless forfeited, continues in the appropriator."—Wheeler v. Northern Colo. Irr. Co., 10 Colo. 582, 587-8 ('87), 17 P. 487.

As just stated, there is no specific property in running water, but it is now well settled that the right to the use of water acquired by appropriation (11) is property (12) and will be protected as such. (13) It can only be lost or transferred by the act of the party, by conveyance, (14) abandonment, (15) forfeiture, (16) or operation of law. (17) A water right or an interest in a water right has been held in many cases to be real estate, (18) or a species of realty, (19) and the right to have a certain quantity of water flow through an irrigating ditch, which is but an inartificial way of referring to a water right, is a freehold estate. (20)

§ 130. Water Rights as Appurtenances.

One of the most important questions to be determined in connection with the conveyance of irri-

(11) *Ante*, §§39-62.

(12) Dalton v. Bowker, 8 Nev. 190 ('73); Union Colony v. Elliott, 5 Colo. 371 ('80); Ft. Morgan L. & C. Co. v. So. Platte Ditch Co., 18 Colo. 1, 30 P. 1032 ('92); Nichols v. McIntosh, 19 Colo. 22, 34 P. 278 ('93).

(13) Cases cited in §128, note 2. Crippen Tr. v. Comstock, 17 Colo. App. 89, 66 P. 1074 ('01); Frank v. Hicks, 4 Wyo. 502, 35 P. 475 ('94); Hard v. Boise City Irr. & L. Co., 9 Ida. 589, 76 P. 331 ('04). See Farmers' Irr. Dist. v. Frank, — Neb. —, 100 N. W. 286 ('04).

(14) *Post*, §130.

(15) *Ante*, §§63-65.

(16) *Ante*, §§66, 67.

(17) Fisher v. Bountiful City, 21 Utah 29, 59 P. 510 ('99).

(18) Hill v. Newman, 5 Cal. 445, 63 Am. Dec. 140 ('55); Lower King's, etc., D. Co. v. King's River, etc., Co., 60 Cal. 408 ('82); Oneto v. Restano, 78 Cal. 374, 20 P. 743 ('89); Dorris v. Sullivan, 90 Cal. 279, 27 P. 217 ('91); Hayes v. Fine, 91 Cal. 391, 27 P. 772 ('91); Fudickar v. East Riverside Irr. Dist., 109 Cal. 29, 41 P. 1024 ('95); Child v. Whitman, 7 Colo. App. 117, 42 P. 601 ('95); Travelers' Ins. Co. v. Childs, 25 Colo. 360, 54 P. 1020 ('98); Talcott v. Mastin, 20 Colo. App. 488, 79 P. 973 ('05); Ada Co. Farmers' I. Co. v. Farmers' C. Co., 5 Ida. 793, 51 P. 990 ('98); see Farmers' Irr. Dist. v. Frank, — Neb. —, 100 N. W. 286 ('04).

(19) Barkley v. Tieleke, 2 Mont. 59 ('74). This case was held not to apply to agricultural, but to mining water rights, in the case of McDonald v. Lannen, 19 Mont. 78, 47 P. 648 ('97). The court there said that a squatter on the public domain could verbally transfer the possession of his claim and his improvements, and that it would be unreasonable to hold that he could not transfer the water right that was merely incidental and appurtenant thereto. See *post*, §130.

(20) Wyatt v. Larimer and Weld Irr. Co., 18 Colo. 298, 33 P. 144 ('93).

gated lands is, whether or not the water right (21) is an appurtenance of the land upon which it has been used, and, like a house, barn or fence, will pass by a deed describing the land only and which is silent as to the water right. (22)

The first case in Colorado involving a sale of a water right, was Strickler v. City of Colorado Springs. (23) This case did not directly involve nor decide whether or not the water right would pass as an appurtenance, but related to the right of the owner of a water right to sell and convey it separate and apart from the land upon which it had been used. The court, however, discussed the question whether or not the water was appropriated for a particular piece of land, and held that it was not, that the fact that the appropriator may change the place of use disposes of the contention that it is appropriated for a particular parcel of land, saying:

"It logically follows that the right to the use of the water for irrigation is a right not so inseparably connected with the land that it may not be separated therefrom."

The reasoning in this case evidently confused and misled the court of appeals of Colorado in the case of Bloom v. West, (24) in which case, after discussing the case of Strickler v. City of Colorado Springs, (25) the court held that the water was not an appurtenance of the land under any circumstances. Prior to this case, and after the decision in the Strickler case, (26) the question whether or not the water right (27) was an appurtenance to the land was mentioned in several cases, but not decided. (28) The decision of the Colo-

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(21) *Ante*, §129.
(22) *Ante*, §129, note 18.
(23) 16 Colo. 61, 26 P. 313 ('91).
(24) 3 Colo. App. 212, 32 P. 846 ('93).
(25) Note 23, *supra*.
(26) Strickler v. City of Colorado Springs, 16 Colo. 61, 26 P. 313 ('91).
(27) *Ante*, §129.
(28) Empire Land & Canal Co. v. Co. Treas., 1 Colo. App. 205, 28 P. 484 ('91); Oppenlander v. Left-Hand D. Co., 18 Colo. 142, 31 P. 854 ('92); see Chamberlin v. Amter, 1 Colo. App. 13, 27 P. 88 ('91).

rado court of appeals in Bloom v. West,(29) was criticised by the supreme court of Wyoming. (30) The Wyoming court said that although the conclusion of the Colorado court of appeals was right in the case before it, the declaration in its opinion that under no circumstances could a water right pass as an appurtenance to land, was not only *dictum*, but that no such conclusion followed from the doctrine laid down by the supreme court of Colorado in the Strickler case, (31) upon which the announcement in question was based, and that it was also contrary to all previous decisions. The later cases in Colorado, however, repudiated the announcement of the court of appeals in Bloom v. West, (32) and following the doctrine announced in the Strickler case, (33) held that the deed to land upon which water has been used does not *per se* convey the water right as an appurtenance; that the land and water right are two distinct properties; but if the deed or the facts and circumstances surrounding the conveyance show that it was the intention of the parties to convey the water right, it will then be held to pass as an appurtenance. (34) In Colorado it was held that a sheriff's deed, regardless of the intention, does not convey the water right, where the right was not specifically levied

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(29) 3 Colo. App. 212, 32 P. 846 ('93).

(30) Frank v. Hicks, 4 Wyo. 502, 35 P. 475, 1025 ('94).

(31) Strickler v. City of Colorado Springs, 16 Colo. 61, 26 P. 313 ('91).

(32) 3 Colo. App. 212, 32 P. 846 ('93).

(33) Strickler v. City of Colorado Springs, 16 Colo. 61, 26 P. 313 ('91).

(34) Arnett v. Linhart, 21 Colo. 188, 40 P. 355 ('95); Gelwicks v. Todd, 24 Colo. 494, 52 P. 788 ('98), quoting with approval from Frank v. Hicks, *supra*, note 30; Travelers' Ins. Co. v. Childs, 25 Colo. 360, 54 P. 1020 ('98). In Daum v. Conley, 27 Colo. 56, 59 P. 753 ('99), it was held that the mere fact that a deed of land was silent as to the conveyance of appurtenant water rights, which had been utilized by the grantor, did not warrant a finding that the grantor did not intend to convey such rights, as that question was one of intention, to be determined from all the circumstances surrounding the conveyance. King v. Ackroyd, 28 Colo. 488, 66 P. 906 ('01); Bessemer Irr. Ditch Co. v. Wooley, 32 Colo. 437, 76 P. 1053 ('04). In the latter case the court expressly notes the difference between the rulings of the courts of other arid states and those of Colorado, and reaffirms its previous decisions on this question.

upon. Such an instrument is an involuntary conveyance, and the sheriff's intention cannot bind the owner. (35) The contrary was held in the case of Briggs v. Murray, (36) where a water right was held to be appurtenant to mill property, and to pass by a sheriff's deed without special mention. With the exception of Colorado, it is now generally settled law that water rights are regarded as appurtenances to the land upon which they are used, and that a deed of the land *per se* passes the water right, unless expressly reserved. (37) In Frank v. Hicks, (38) Conaway, J., in a well reasoned opinion, after citing numerous authorities, (39) said:

"Thus it seems that the doctrine is very general in the states of the arid region, that a water right becomes appurtenant to the land upon which the water is used, and the ditch, water pipe or other conduit for the water, becomes attached to the land either as appurtenant or incident to the land and necessary to its beneficial enjoyment, and therefore becomes part and parcel of the realty."

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(35) Cooper v. Shannon, — Colo. —, 85 P. 175 ('06).
(36) 29 Wash. 245, 69 P. 765 ('02). See *ante*, §125, note 102.
(37) Cave v. Crafts, 53 Cal. 135 ('78); Farmer v. Water Co., 56 Cal. 11 ('80); Clyne v. Benicia Water Co., 100 Cal. 310, 34 P. 714 ('93); Bank of British N. A. v. Miller [Ore.], 6 Fed. 545 ('81); Simmons v. Winters, 21 Ore. 35, 27 P. 7 ('91); Hindman v. Rizor, 21 Ore. 112, 27 P. 13 ('91); Coventon v. Seufert, 23 Ore. 548, 32 P. 508 ('93); Low v. Shaffer, 24 Ore. 239, 33 P. 678 ('93); Nevada Ditch Co. v. Bennett, 30 Ore. 59, 45 P. 472 ('96); Turner v. Cole, 31 Ore. 154, 49 P. 971 ('97); No. Powder M. Co. v. Coughanour, 34 Ore. 9, 54 P. 223 ('98); Mattis v. Hosmer, 37 Ore. 523, 62 P. 17 ('00); Geddis v. Parrish, 1 Wash. St. 587, 21 P. 314 ('89); Briggs v. Murray, 29 Wash. 245, 69 P. 765 ('02); Tucker v. Jones, 8 Mont. 225, 19 P. 571 ('88); Sweetland v. Olsen, 11 Mont. 27, 27 P. 339 ('91); Crawford *et al.* v. Minn. & M. L. & I. Co., 15 Mont. 153, 38 P. 713 ('94); Sloan v. Glancy, 19 Mont. 70, 47 P. 334 ('97); Bullerdick v. Hermsmeyer, 32 Mont. 541, 81 P. 334 ('05); Wilson v. Higbee [Nev.], 62 Fed. 723 ('94); Smith v. N. Canyon W. Co., 16 Utah 194, 52 P. 283 ('98); Snyder v. Murdock, 20 Utah 419, 59 P. 91 ('99); George v. Robison *et al.*, 23 Utah 79, 63 P. 819 ('01); Toyaho Cr. Irr. Co. v. Hutchins, 21 Tex. Civ. App. 274, 52 S. W. 101 ('99); Frank v. Hicks, 4 Wyo. 502, 35 P. 475 ('94); Farm Inv. Co. v. Gallup, 13 Wyo. 20, 76 P. 917 ('04). See, also, Smith v. Denniff, 24 Mont. 20, 60 P. 398 ('00).
(38) 4 Wyo. 502, 35 P. 475 ('94).
(39) See cases cited in note 37, *supra*.

The supreme court of Oregon in the case of Coventon v. Seufert, (40) gave the fundamental reason for this rule, as follows:

"The maxim of the law is that whoever grants a thing is supposed, also, tacitly to grant that without which the grant would be of no avail."

The United States circuit court of appeals for the eighth circuit, in a Colorado case, (41) applied this reasoning in holding that a water right used upon a mill site to treat ore, extracted from a mining claim and brought to the mill site for treatment, was not an appurtenance to the mining claim but to the mill site.

A water right can become appurtenant to unsurveyed public land, where the appropriator is a lawful occupant of the land. (42) But in the case of Hayes v. Buzzard (43) the supreme court of Montana held that a water right did not become an appurtenance to a desert entry, so as to be abandoned by a cancellation of the desert entry. Water rights do not become appurtenant to land when used thereon by a trespasser, (44) nor does the fact that water is used upon land to which it is appurtenant by one who is a mere trespasser, entitle him, upon being evicted from the land, to divert the water to other land or to convey the legal title thereto, to a stranger. (45)

By statute in Arizona, (46) Nebraska, (47) Utah, (48) and Nevada, (49) and the irrigation codes of Oklahoma (50) and South Dakota, (51) it is provided that the appropriation of water for irrigation must

(40) 23 Ore. 548, 32 P. 508 ('93). See, also, Frank v. Hicks, 4 Wyo. 502, 35 P. 475 ('94).
(41) N. Am. Exploration Co. v. Adams, 104 Fed. 404 ('00).
(42) Ely v. Ferguson, 91 Cal. 187, 27 P. 587 ('91); Wood v. Lowney, 20 Mont. 273, 50 P. 794 ('97).
(43) 31 Mont. 74, 77 P. 423 ('04).
(44) Smith v. Logan, 18 Nev. 149, 1 P. 678 ('83).
(45) Alta Land & W. Co. v. Hancock, 85 Cal. 219, 24 P. 645 ('90).
(46) Gould v. Maricopa, etc., Co., — Ariz. —, 76 P. 598 ('04); Slosser v. Salt River Co., 7 Ariz. 376, 65 P. 332 ('01).
(47) Farmers' Irr. Dist. v. Frank, — Neb. —, 100 N. W. 286 ('04).
(48) Laws 1905, ch. 108, §60; *post*, ch. 47.
(49) Laws 1905, p. 66; *post*, §1492.
(50) Laws 1905, p. 275, §1; *post*, ch. 43.
(51) Laws 1905, p. 201, §2; *post*, ch. 45.

become appurtenant or fixed to some specific land from which it can be separated only in the manner provided by the statute for changing the place of use. (52) Thus, attached to the land, the water right in these states and territories cannot thereafter be sold separately except with the consent of the state engineer after the publication of notice thereof. It may be observed that "appurtenant" does not mean "inseparable," and water rights, although appurtenant to land and hence passing by a conveyance of the land, may nevertheless exist as entirely independent and distinct property rights, and be conveyed separate and apart from the land. (53)

§ 131. Tenants in Common.

As we have seen, (54) several persons may join in constructing a ditch, canal or other works and in diverting the water from the natural stream. In such cases they are tenants in common of the ditch, canal or other works, but such joint ownership of the means of diversion does not make them tenants in common in the ownership of the water rights. (55) For, as we have seen, these two distinct properties may be owned by different persons, associations or corporations. (56) Appropriators of different dates may be tenants in common in the means of diversion without losing their priority of appropriation. (57)

(52) *Ante*, §47.
(53) Cave v. Crafts, 53 Cal. 135 ('78); Coonradt v. Hill, 79 Cal. 587, 21 P. 1099 ('90); Crooker v. Benton, 93 Cal. 365, 28 P. 953 ('92); Smith v. Corbit, 116 Cal. 587, 48 P. 725 ('97); Tucker v. Jones, 8 Mont. 225, 19 P. 571 ('88); Sweetland v. Olsen, 11 Mont. 27, 27 P. 339 ('91); Smith v. Denniff, 23 Mont. 65, 57 P. 557 ('99), 60 P. 398 ('00); Simmons v. Winters, 21 Ore. 35, 27 P. 7 ('91); Coventon v. Seufert, 23 Ore. 548, 32 P. 508 ('93); Turner v. Cole, 31 Ore. 154, 49 P. 971 ('97); Toyaho Cr. Irr. Co. v. Hutchins, 21 Tex. Civ. App. 274, 52 S. W. 101 ('99); Snyder v. Murdock, 20 Utah 419, 59 P. 91 ('99); Fisher v. Bountiful City, 21 Utah 29, 59 P. 520 ('99); Frank v. Hicks, 4 Wyo. 502, 35 P. 475, 1025 ('94); McPhail v. Forney, 4 Wyo. 556, 35 P. 773 ('94). See Colorado cases cited in note 34, *supra*.
(54) *Ante*, §127.
(55) *Ante*, §129.
(56) *Ante*, §116.
(57) Rominger v. Squires, 9 Colo. 327, 12 P. 213 ('86); Farmers' H. L. C. & R. Co. v. Southworth, 13 Colo. 11, 21 P. 1028 ('89); Nichols v. McIntosh, 19 Colo. 22, 34 P. 278 ('93).

Where the construction of diverting works and the appropriation of water are both accomplished and owned by several persons acting together, there is then a tenancy in common in both the ditch and the water rights. The quantity of water to which each of such co-operators is entitled is determined by the terms of the contract between them, and their joint rights are governed by the law of co-tenancy. (58) One tenant in common may preserve his interest in the property after an abandonment by the others. (59) One tenant in common may maintain a suit in equity to restrain an infringement of his rights in the waters of a stream without joining his co-tenant. (60) Each tenant in common is equally bound to keep the ditch in repair; but where, through the neglect of one tenant in common, the land of the other is overflowed, the latter cannot fill up the ditch. (61)

CHAPTER 25.

CONTRACTS.

§ 132. Contracts Relating to Water.

As a general rule contracts relating to canals, ditches, water and water rights are governed and construed by the principles relating to the law of contracts. (62) There are certain matters, however, peculiar to waters and their appropriation that often

(58) Shilling v. Rominger, 4 Colo. 100 ('78); Lytle Cr. W. Co. v. Perdew, 65 Cal. 447, 4 P. 426 ('84); Santa Paula W. W. v. Peralta, 113 Cal. 38, 45 P. 168; Tucker v. Jones, 8 Mont. 225, 19 P. 571 ('88); Crowder v. McDonnell, 21 Mont. 367, 54 P. 44 ('98); Moss v. Rose, 27 Ore. 595, 41 P. 666 ('95); Biggs v. Utah D. Co., 7 Ariz. 331, 64 P. 494 ('01); Rodgers v. Pitt [Nev.], 129 Fed. 932 ('04). In order to constitute a tenancy in common in a water right, the right to a unity of possession must extend to the right of user.—City of Telluride v. Davis, 33 Colo. 355, 80 P. 1051 ('05).

(59) Meagher v. Hardenbrook, 11 Mont. 385, 28 P. 451 ('91)

(60) Union Mill Co. v. Dangberg [Nev.], 81 Fed. 73 ('97); Cache La Poudre Irr. Co. v. Larimer and Weld Res. Co., 25 Colo. 144, 53 P. 318 ('98).

(61) Moss v. Rose, 27 Ore. 595, 41 P. 666 ('95).

(62) See *ante*, §120; Irr. Companies, §119; fixing rates, §96; Anti-Royalty Act, §95.

make it necessary to turn to the statutes and special rules of decision.

Water rights are real property, (63) and hence all contracts relating to the sale thereof come within the statute of frauds and must be in writing. (64)

CHAPTER 26.

SALES, DEEDS AND MORTGAGES.

§ 133. Selling Part—Excess—Changing Use—Incomplete Appropriation.

The right to the use of water, called a water right, (65) being a property right, (65) may be sold or otherwise transferred. An appropriator may sell all or a portion of the water which he has a right to use, (66) but he cannot sell and retain the water at the same time. (67) It has been held that a sale by the appropriator of a right to use a portion of the water appropriated by him for the irrigation of his land, does not necessarily indicate that he has appropriated more water than he actually needed. (68) It would seem, however, that unless he procured water from another source or made some radical change in farming methods or some other like event had happened to release from use on his own land the quantity of water transferred by him to another, —there may be some doubt as to the meaning or extent of this decision. An appropriation is measured by the needs of the appropriator. He cannot appropriate more water than is necessary for such of his lands as are capable of irrigation.(69) Therefore, if by continued cultivation and irrigation his lands reach

(63) *Ante*, §129.
(64) See *post*, §134, note 80.
(65) *Ante*, §129.
(66) Strickler v. Colo. Springs, 16 Colo. 61, 26 P. 313 ('91); Ft. Morgan L. & C. Co. v. So. Platte D. Co., 18 Colo. 1, 30 P. 1032 ('92); Middle Cr. D. Co. v. Henry, 15 Mont. 558, 39 P. 1054 ('95); Frank v. Hicks, 4 Wyo. 502, 35 P. 475, 1025 ('94); Millheiser v. Long, 10 N. M. 99, 61 P. 111 ('00); Hall *et al.* v. Blackman, 8 Ida. 272, 68 P. 19 ('02).
(67) Millheiser v. Long, 10 N. M. 99, 61 P. 111 ('00).
(68) Drake v. Earhart, 2 Ida. 716. 23 P. 541 ('90).
(69) *Ante*, §58.

the state where they require less water than in the beginning, he is only entitled to divert from the stream the quantity which he can beneficially use, and the excess should be left in the stream or ditch for the use of others. Waste will not be tolerated, (70) and it would seem that the excess if not resulting as mentioned above instead of being sold by him, should, as just suggested, revert to the public waters for the benefit of subsequent appropriators in the order of their appropriations. Such disposition if not the rule of decision, would at least be consistent with the fundamental principles of the doctrine of appropriation. In accordance with the principle that the use to which water is put is immaterial if it is beneficial, (71) it is not necessary, as long as the rights of others are not interfered with, that the purchaser of a water right should apply the water to the same uses as those of his grantor. (72) Hence, a city may purchase for municipal purposes, the rights of an appropriator for irrigation, and will succeed to the priority rights of the original appropriator. (73) An appropriator may, before the completion of his appropriation, sell his rights, and the grantee, by prosecuting the work to completion with reasonable diligence, will succeed to his grantor's rights. The grantee, however, must purchase all the rights of the grantor so that his continuation of the work will be practically the same enterprise. (74)

§ 134. Sales, Deeds and Mortgages—Statute of Frauds.

The water right being an appurtenance to the land in all states except Colorado, it will pass by a conveyance of the land without any mention of the water right, unless the right be expressly reserved in the deed, (75) and the water right will also pass

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(70) *Ante*, §84.
(71) *Ante*, §45.
(72) *Ante*, §47.
(73) Strickler v. Colo. Springs, 16 Colo. 61, 26 P. 313 ('91). See Drake v. Earhart, 2 Ida. 716, 23 P. 541 ('90); Springville v. Fullmer, 7 Utah 450, 27 P. 577 ('91).
(74) Colo. Land & Water Co. v. Rocky Ford Canal, Res. L. L. & Tr. Co., 3 Colo. App. 545, 34 P. 580 ('93).
(75) See §130, note 37.

as an appurtenance of the ditch, without being referred to in the conveyance. In Colorado, where it is held that a water right is a distinct subject of grant and can be transferred either with or without the land, it is held to be a question of the intention of the grantor whether or not the water right was intended to be conveyed. When the deed is silent on the question, this intention is ascertained from the circumstances surrounding the transaction, and whether or not such right is or is not incident and necessary to the enjoyment of the land. (76) The right of the appropriator does not depend upon the use to which the water is put, but the use, place of use and diversion can be changed so long as the rights of others are not infringed. (77) The water right, therefore, is a property right which may exist separately from the ditch or land in connection with which it was acquired, and a conveyance of the ditch or the land does not necessarily pass the water right; either may be conveyed separately and apart from the other. (78) It may be stated as a general rule that the right to the use of water being treated as real estate its transfer should be made by deed, with all the formalities requisite to such an instrument; (79) and any contract for the conveyance of a ditch or water

(76) See cases cited, *ante*, §130, note 34. See, also, Farm Inv. Co. v. Gallup, 13 Wyo. 20, 76 P. 917 ('04).

(77) *Ante*, §§46, 47.

(78) As to necessity of intention to convey, see *ante*, §130; Strickler v. Colo. Springs, 16 Colo. 61, 26 P. 313 ('91); Oppenlander v. L. H. D. Co., 18 Colo. 142, 31 P. 854 ('92); Arnett v. Linhart, 21 Colo. 188, 40 P. 355 ('95); Gelwicks v. Todd, 24 Colo. 494, 52 P. 788 ('98); Cache La Poudre I. Co. v. Larimer, etc., Co., 25 Colo. 144, 53 P. 318 ('98); Crippen Tr. v. Comstock, 17 Colo. App. 89, 66 P. 1074 ('01); Wilson v. Higbee [Nev.], 62 Fed. 723 ('94); Middle Cr. D. Co. v. Henry, 15 Mont. 558, 39 P. 1054 ('95); Ada Co. Farmers' Irr. Co. v. Farmers' C. Co., 5 Ida. 793, 51 P. 990 ('98); Hard v. Boise City I. & L. Co., 9 Ida. 589, 76 P. 331 ('04); Millheiser v. Long, 10 N. M. 99, 61 P. 111 ('00).

(79) Smith v. O'Hara, 43 Cal. 371 ('72); Burnham v. Freeman, 11 Colo. 601, 19 P. 761 ('88); Child v. Whitman, 7 Colo. App. 117, 42 P. 601 ('95); Middle Cr. D. Co. v. Henry, 15 Mont. 558, 39 P. 1054 ('95). In this case a conveyance was held valid as between the parties, although not acknowledged or recorded.—McDonald v. Lannen, 19 Mont. 78, 47 P. 648 ('97); Ada Co. Farmers' I. Co. v. Farmers' C. Co., 5 Ida. 793, 51 P. 990 ('98); Mattis v. Hosmer, 37 Ore. 523, 62 P. 17 ('00).

right is within the statute of frauds and should be in writing. (80) But a person, neither a party nor privy to such contract, cannot object if it is not in writing. (81) There have been a number of decisions holding that where the appropriator has merely a possessory right to land, such as an entry or filing on government land, the water right is an improvement in the sense that buildings and fences are improvements, and a verbal sale or transfer of the appropriator's improvements will be a valid transfer of the water right unless such right is expressly reserved. (82) Natural persons have the same right to sell and convey the right to use water as have corporations. (83) In construing a mortgage of land, on which an irrigation ditch is located, to ascertain what interest in the ditch was covered thereby, the instrument should be examined in the light of all the facts regarding the use of the ditch before and after the mortgage. (84) In Travelers' Ins. Co. v. Childs, (85) where a water right which had originally been located on one tract of land had been segregated and used for six years upon another tract, and both of these tracts were included in a deed of trust given to secure a note, but the former one was afterwards released, in order to enable the owner to convey it, the water not being mentioned in the release or deed of conveyance, it was held that the water right was not released. It may be stated generally that the conveyance of water rights by mortgage or trust deed is governed by the same familiar rules which govern the sale and conveyance and mortgaging of real estate.

(80) Oneto v. Restano, 78 Cal. 374, 20 P. 743 ('89); Dorris v. Sullivan, 90 Cal. 279, 27 P. 216 ('91); Hayes v. Fine, 91 Cal. 391, 27 P. 772 ('91); Griseza v. Terwilliger, 144 Cal. 456, 77 P. 1034 ('04).

(81) Daum v. Conley, 27 Colo. 56, 59 P. 753 ('99).

(82) Geddis v. Parrish, 1 Wash. St. 587, 21 P. 314 ('89); Hindman v. Rizor, 21 Ore. 112, 27 P. 13 ('91); Low v. Shaffer, 24 Ore. 239, 33 P. 678 ('93); Nevada D. Co. v. Bennett, 30 Ore. 59, 45 P. 472 ('96); McDonald v. Lannen, 19 Mont. 78, 47 P. 648 ('97); Wood v. Lowney, 20 Mont. 273, 50 P. 794 ('97).

(83) New Mercer D. Co. v. Armstrong, 21 Colo. 357, 40 P. 989 ('95).

(84) Farm Inv. Co. v. Gallup, 13 Wyo. 20, 76 P. 917 ('04). In this case it was held that the mortgage passed so much only of the mortgagee's interest in the ditch as was used for and necessary to the irrigation of the land described therein.

(85) 25 Colo. 360, 54 P. 1020 ('98).

PART VII.

REMEDIES, PLEADING AND PRACTICE.

CHAPTER 27.

ADJUDICATION OF RIGHTS OF PRIORITY TO TAKE WATER FROM NATURAL STREAM.

(a) *In General.*

§ 135. Nature and Objects.

The statutory adjudication of the right of priority to take water from the natural stream is designed to provide for an orderly distribution of the appropriated waters of natural streams. Were there no provision for ascertaining and fixing by decree the relative rights of each appropriator, confusion and chaos would reign in every arid or semi-arid locality, each appropriator, regardless of the rights of others, would be seeking to take all of the water he could convey through his diverting works, and suits between individual appropriators would be numerous, and never-ending.

The statutory proceeding to adjudicate the rights of the various appropriators is not an ordinary civil action or proceeding, but is a proceeding *sui generis*, (1) to which the rules governing ordinary civil actions are not always applicable. (2) It is in the nature of an action *in rem*, (3) and is for the purpose of settling questions of the relative priorities of the

(1) Of its own kind or class.
(2) Sterling Irr. Co. v. Downer, 19 Colo. 595, 36 P. 787 ('94).
(3) Louden Irr. C. Co. v. Handy D. Co., 22 Colo. 102, 43 P. 535 ('95).

claimants of water from the natural stream for the purposes of irrigation, (4) to the end that the public records may preserve an accurate and well defined statement thereof, and as an aid to adequate and effective state control of public waters. (5) It is also in the nature of a police regulation. (6) In Colorado the legislature in 1879 enacted a statute which was supplemented by the act of 1881 furnishing a system of procedure in the courts for the settlement of all questions of priority of appropriation of water from the natural stream between appropriators in the same district. (7) Wyoming first adopted the Colorado system of adjudication in 1886, (8) "although the imperfections of that law soon asserted themselves." (9) This law, however, was adopted "because," as Potter, J., said, (10) "of the inability of the ordinary procedure and processes of the law to meet the necessities pertaining to the segregation by various individuals or companies of water from the same stream, by separate ditches or canals, and at different points along its course." By the act of 1891, (11) the former court proceeding was superseded by the adjudication of priority rights by the board of control. (12) The progress of the Wyoming legislation has been toward centralized control. (13) These acts furnish the basis of the two systems generally

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(4) New Mercer D. Co. v. Armstrong, 21 Colo. 357, 40 P. 989 ('95); Putnam v. Curtis, 7 Colo. App. 437, 43 P. 1056 ('96).
(5) Farmers' Irr. Dist. v. Frank, — Neb. —, 100 N. W. 286 ('04).
(6) Farmers' H. L. C. & R. Co. v. Southworth, 13 Colo. 111, 21 P. 1028 ('89); Nichols v. McIntosh, 19 Colo. 22, 34 P. 278 ('93); Sterling Irr. Co. v. Downer, 19 Colo. 595, 36 P. 787 ('94); White v. Farmers' Highline C. & Res. Co., 22 Colo. 191, 197, 43 P. 1028 ('96). See, also, Louden Irr. C. Co. v. Handy D. Co., 22 Colo. 102, 43 P. 535 ('96).
(7) 1 Mills' Ann. Stat. Colo., §§2400-2439; *post*, §§677-716.
(8) Sess. L. 1886.
(9) Potter, J., in Farm Inv. Co. v. Carpenter, 9 Wyo. 110, 61 P. 258, 260 ('00).
(10) *Id.*
(11) Rev. Stat. '99, §§860-873; *post*, ch. 49.
(12) *Post*, §143.
(13) Farm Inv. Co. v. Carpenter, 9 Wyo. 110, 61 P. 258 ('00).

followed in the arid and semi-arid states and territories, which will be discussed and compared in the following sections.

(*b*) *The Colorado System of Adjudication.*

§ 136. Jurisdiction of Courts Generally.

The question of prior appropriation is always a matter of evidence. It is true that the filing of notices or statements has greatly aided in determining the date of appropriation, but the acts necessary to complete the appropriation being the most essential elements of an appropriation,—diversion and application to beneficial use,—have always to be shown in order to establish a perfected appropriation. In addition to these necessary elements, the time and amount or extent of the appropriation are also essential matters of proof, and where the consumer is not the owner of the ditch, the ditch owner is then, as we have seen, at least in Colorado, (14) his agent in taking water from the natural stream; hence the consumer is vitally interested in the amount of water and the date of the priority assigned to the ditch that serves him. These various matters of proof are almost certain to lead to disputes which frequently cannot be adjusted by the parties themselves.

The water rights enjoyed by the several consumers under a ditch, being property rights, the determination of the priorities of the several ditches to take water from the natural stream is, therefore, a proper subject for the courts, subject to the usual rules of procedure. In Frey v. Louden (15) the supreme court of California held that it is within the equity jurisdiction of a court to ascertain and determine the extent of the respective rights of several appropriators from a natural stream, and to regulate the use of the water between them in such a way as to maintain equality of rights. In Utah, (16) it was held that

(14) *Ante*, §116.
(15) 70 Cal. 550, 11 P. 838 ('86). See, also, Barrows v. Fox, 98 Cal. 63, 30 P. 768 ('92).
(16) Nephi Irr. Co. v. Jenkins, 8 Utah 369, 31 P. 986 ('93).

where a court of equity is unable to determine the quantity of water to which the appropriators from a natural stream are entitled, it may, with or without the consent of the parties, refer the cause to a master for further investigation. The court necessarily is clothed with power to enforce its decrees and may prescribe the method by which the water from the natural stream is to be measured. (17)

§ 137. Jurisdiction Under Colorado System.

By statute in Colorado the adjudication of priorities to take water from the natural stream is especially provided for, (18) and these acts constitute a complete system of procedure which, according to the supreme court of the state, "has been found so salutary and free from unnecessary expense as to command the tacit indorsement of all subsequent legislatures." (19)

The proceeding is instituted by any one or more persons, associations or corporations owning any ditch, canal or reservoir taking water from the natural streams in any water district, by presenting to the district court of the proper county or to the judge of such court, a motion, application or petition, praying such court to adjudicate the rights of priority between the several ditches entitled to water in such district. The court or judge shall, if he deems that the matter can be heard in open court, appoint a day in some regular or special term of such court when the taking of evidence in such adjudication shall begin. Or the court may appoint a referee, which, as a matter of fact, it generally does. Parties owning or claiming any interest in any ditch, canal, reservoir or other diverting works within said district, shall file with the clerk of said court a statement of their respective claims, under oath, containing their several names and addresses, the name and description of

(17) Tolman v. Casey, 15 Ore. 83, 13 P. 669 ('87); Elliott v. Whitmore, 10 Utah 246, 37 P. 461 ('01); see, also, McGinness v. Stanchfield, 6 Ida. 372, 55 P. 1020 ('98); Raft River L. & C. Co. v. Langford, 5 Ida. 62, 46 P. 1024 ('96).

(18) *Ante*, §136.

(19) Louden Irr. C. Co. v. Handy D. Co., 22 Colo. 102, 43 P. 535 ('95).

such ditch, canal, reservoir or other diverting works, the name of the stream from which the supply of water is obtained, the date of appropriation by original construction, enlargement or extension, the amount of water claimed, the capacity of the ditch, canal, reservoir or other works, and the number of acres being or proposed to be irrigated by means thereof. Such statement must be filed before any evidence will be received from any person, association or corporation representing such ditch, canal, reservoir or other diverting works The court or referee shall hear all evidence that may be offered by any person, association or corporation interested, in support of or against any claim of priority of appropriation by means of any ditch, canal, reservoir or other diverting works, and upon all of such evidence and the arguments of parties or their counsel, the court shall make and enter a decree, or the referee shall report the form of a decree, establishing the priorities of those appropriations concerning which evidence has been offered. Notice of such proceedings is required to be given to all parties interested; re-argument and re-hearings and appeals are provided for. It has been held that this statutory proceeding is for the adjudication of rights for irrigation only, and cannot be resorted to to determine the rights of parties to the use of water for domestic or other purposes. (20) Where a water district is situated in two or more counties, the district court of either county in which proceedings are first begun is the proper court to adjudicate the priorities of rights to the use of water in such district, and such court acquires and retains exclusive jurisdiction to adjudicate the priorities in such district. (21) The section of the act (22) which confers exclusive jurisdiction upon the court which first properly acquires jurisdiction, applies only to the jurisdiction of the proceeding to adjudicate priorities, and does not

(20) Platte W. Co. v. Northern Colo. Irr. Co., 12 Colo. 525, 21 P. 711 ('89). See, also. note 25, *infra*.

(21) Presbyterian College v. Poole, 25 Colo. 50, 52 P. 1103 ('98). See Louden Irr. C. Co. v. Handy D. Co., 22 Colo. 102, 43 P. 535 ('95).

(22) 1 Mills' Ann. Stat., §2399.

apply to an action to protect rights which have been awarded in such adjudication proceeding. Such latter action may be brought in any county having jurisdiction, without regard to the county in which the statutory proceedings of adjudication were had. (23) Should an irrigation district be divided by the legislature, before the final adjudication of priorities therein, the subject-matter of a pending proceeding to adjudicate priorities is necessarily affected, and the district court of the proper county in the new irrigation district then becomes vested with jurisdiction to determine the priorities in such new district. (24) This statutory proceeding is only for the purpose of adjudicating priorities to take water out of the natural stream, as between the ditches themselves or their several owners, and the court has no jurisdiction in such a proceeding to determine the disputes between the several consumers or water right claimants under the same ditch. (25) Nor has the court jurisdiction to give any definite decree to a ditch not then complete, (26) nor to award priorities to the use of water to be used on lands outside the state, although the headgate of the ditch is within this state. (27) One who was a party to an adjudication and who submitted without questioning the jurisdiction of the court, and accepted the benefits of the decree for several years thereafter, will not be permitted to attack the decree, on the ground that the court had no jurisdiction because the court of another county had acquired jurisdiction by appointing a referee, before the court rendering the decree had taken any steps in the matter. (28)

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(23) Buckers' Irr. Co. v. Farmers' D. Co., 31 Colo. 62, 72 P. 49 ('03).

(24) Sterling Irr. Co. v. Downer, 19 Colo. 595, 36 P. 787 ('94).

(25) Putnam v. Curtis, 7 Colo. App. 437, 43 P. 1056 ('96). See, also, note 20, *ante*.

(26) Water Sup. & Stor. Co. v. Tenney, 24 Colo. 344, 51 P. 505 ('97).

(27) Lamson *et al.* v. Vailes, 27 Colo. 201, 61 P. 231 ('00).

(28) Consolidated Home Sup. D. & R. Co., v. New Loveland and Greeley Irr. & Land Co., 27 Colo. 521, 62 P. 364 ('00).

§ 138. Referees Under Colorado Statute.

If the district court finds that it will be unable to hear all the evidence that will probably be introduced in adjudication of priorities from the natural stream, it may make an order appointing a referee, (29) before whom the proceeding shall continue. The referee is required to give notice to all persons, associations or corporations interested, of the time and place when the hearing will be commenced and statement of claims be filed. He shall hear and transcribe, or cause to be transcribed, the evidence of all witnesses. He is empowered to administer oaths, issue subpœnas, require the attendance of witnesses, and to perform general judicial functions in the premises. After the completion of the testimony he is required to make an abstract thereof, also separate findings of fact in connection with each ditch, canal or other works, and to prepare a decree in accordance with such findings, all of which must be returned and filed with the clerk of the district court. Upon the hearing and determination of such report, any party interested may except to any matter in the findings or decree. The court then causes the decree to be entered of record with any modifications or changes it may see fit to make. (30) In the case of New Mercer D. Co. v. Armstrong, (31) it was held that the referee could re-open the hearing for the purpose of considering a statement of claim and the evidence in support thereof, where the necessary witnesses could not be discovered before the close of the proceeding.

§ 139. Ditch Decrees in Colorado.

The decree rendered by the court in a statutory proceeding to adjudicate the right of priority to water from the natural stream does not grant any new property rights, but merely embodies in a permanent

(29) Ft. Morgan Land & Canal Co. v. So. Platte Ditch Co., 18 Colo. 1, 30 P. 1032 ('92).
(30) Dorr v. Hammond, 7 Colo. 79, 1 P. 693 ('83).
(31) 21 Colo. 357, 40 P. 989 ('95).

form the evidence of those previously acquired. (32) The decree designates the date of the priority, (33) the quantity of water to be diverted, generally expressed in cubic feet per second of time, or, if the evidence is not sufficiently definite to enable the court to ascertain the cubic feet, then the amount is designated by the depth, width and grade of the diverting works, or in any manner to show the amount of water to be diverted. A certified copy of the decree in so far as it relates to the priority of a given ditch, canal or other works, is furnished by the clerk of court to any interested party, upon the payment of a reasonable fee, and this certified copy is exhibited to the water commissioner for the given district, and it is then his warrant for distributing and regulating the flow of water in accordance with its terms. Such certified copy is also recorded in the office of the county clerk and recorder of the proper county, and a certified copy of such record is *prima facie* evidence of that portion of the decree therein set forth. The court cannot give a decree in favor of a ditch or canal not completed. (34)

A conditional decree is not authorized, (35) but such a decree does not render invalid a subsequent final decree, (36) nor is it void so as to be subject to collateral attack. (37) The decree is not *res judicata* as to the party or parties entitled to the control of a particular ditch or to the use of water conveyed through the same, it is conclusive only as to the priority

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(32) New Mercer D. Co. v. Armstrong, 21 Colo. 357, 40 P. 989 ('95).

(33) The same ditch may have two or more priorities belonging to the same or different parties, based upon diversions and beneficial use made at different times. Nichols v. McIntosh, 19 Colo. 22, 34 P. 278 ('93).

(34) Water Sup. & Stor. Co. v. Tenney, 24 Colo. 344, 51 P. 505 ('97); Water Sup. & Stor. Co. v. Larimer and Weld Irr. Co., 24 Colo. 322, 51 P. 496 ('97).

(35) Larimer and Weld Irr. Co. v. Wyatt, 23 Colo. 480, 48 P. 528 ('97); but see Waterman v. Hughes, 33 Colo. 270, 80 P. 891 ('05).

(36) Water Sup. & S. Co. v. Tenney, 24 Colo. 344, 51 P. 505 ('97).

(37) Lake Fork D. Co. v. Haley *et al.*, 28 Colo. 513, 61 P. 158 ('01).

and amount of the appropriation of such ditch, (38) as compared with other ditches taking water out of the natural stream, but it is binding upon all parties to the proceedings. (39) The awarding of priorities in excess of the amount of water actually appropriated at the time, is error. A diversion and promise to use in the future will not support the decree. (40) The ruling in this case appears to conflict with the rule that the appropriator is not required to make a beneficial use of all of the water which it is his intention to appropriate the first year, but that he may use an additional amount of water each season until all has been beneficially applied, provided such application is made within a reasonable time by the exercise of ordinary diligence. (41) It would seem that in such a case the owner of the ditch or canal could refuse to participate in the adjudication proceedings, and after the completion of his appropriation, apply for a supplemental decree establishing the priority of such appropriation. However, this question has never been decided, although in Wyoming the final proofs from which the priorities are ascertained are not taken until the application to a bene-

(38) Oppenlander v. Left-Hand D. Co., 18 Colo. 142, 31 P. 854 ('92).

(39) Farmers' Ind. D. Co. v. Agri. D. Co. 22 Colo. 513, 45 P. 444 ('96); Montrose C. Co. v. Loutsenhizer D. Co., 23 Colo. 233, 48 P. 532 ('96). But see Nichols v. McIntosh, 19 Colo. 22, 34 P. 278 ('93).

(40) Ft. Morgan Land & Canal Co. v. So. Platte Ditch Co., 18 Colo. 1, 30 P. 1032 ('92). In this case Hayt, J., said: "A diversion unaccompanied by application gives no right. This principle, applied to the record in this case, is fatal to the decree rendered by the district court. The capacity of the several ditches enumerated in the decree seems to have been the criterion by which the court was governed, for although evidence was taken tending to show the amount of water actually used in irrigation, such evidence seems to have had but slight effect upon the final decree. It is apparent that the capacity of the various ditches outweighed all other considerations. * * * The court erred in awarding priorities to the several ditches in excess of the amount of water actually appropriated at the time the decree was rendered." See, also, Water Sup. & Stor. Co. v. Tenney, 24 Colo. 344, 352, 51 P. 505 ('97); Water Sup. & Stor. Co. v. Larimer and Weld Irr. Co., 24 Colo. 322, 51 P. 496 ('97).

(41) See *ante*, §45.

ficial use has been made or the time allowed therefor has elapsed. (42)

These decrees are *prima facie* evidence as between different water districts, and until impeached in some appropriate manner they are to be enforced by the public officers who are entrusted with the distribution of water. (43) The decree cannot be attacked in a subsequent suit between two of the parties thereto, (44) nor can it be collaterally attacked and set aside, (45) and a mistake of the trial court in establishing the carrying capacity of a ditch cannot be attacked in such a collateral proceeding. (46)

It is not infrequently the case that from topographical, climatic or other physical conditions a stream will flow a larger volume of water during certain months than at other times, and during such periods of high water a junior appropriator lower down the stream might be supplied. A decree rendered upon such a state of facts was sustained which provided that a senior appropriator should permit all of the water in excess of his prior appropriation to flow down to the junior appropriator whenever such excess was sufficient to be beneficially used by him, and when it was not sufficient for such beneficial use, then the senior appropriator could divert and use all of the water. (47) Such a decree is in accord with the principle which should prevail in every arid state to secure an economical and beneficial use of all of

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(42) *Post*, §143.

(43) Farmers' Ind. D. Co. v. Agricultural D. Co., 22 Colo. 513, 45 P. 444 ('96).

(44) Hall v. Lincoln, 10 Colo. App. 360, 50 P. 1047 ('97).

(45) Water Sup. & S. Co. v. Tenney, 24 Colo. 344, 51 P. 505 ('97); Water Sup. & S. Co. v. Larimer and Weld Irr. Co., 24 Colo. 322, 51 P. 496 ('97). In the latter case Campbell, J., discussed the various formulæ used in computing the carrying capacity of ditches, and particularly the Ganguillet and Kutters formula used by the trial court, and said: "It is in evidence, however, that in accordance with a formula that was in general use in this state at the time the decrees were rendered, the computation, as determined by the decree, was substantially correct, and it further appears that no two computations are ever the same, even with the same formula." See *ante*, §92.

(46) See note 45, also *ante*, §92.

(47) City of Telluride v. Blair, 33 Colo. 353, 80 P. 1053 ('05).

the water, and whenever an appropriator who has a prior right to the use of the water is unable to beneficially apply it to some use, he should not be permitted to keep the water flowing in his ditch, and thus prevent some other person from making a beneficial use of the same.

§ 140. Reopening Decrees and Review in Colorado.

Provision is made by the Colorado statute for reopening a decree, and the court or judge thereof in vacation may, for good cause shown and upon terms that are equitable and just to the parties, order a reargument or review of a decree, but no such order shall be made unless applied for by petition or otherwise within two years after the entry of such decree. (48) The provisions of the statute relating to reopening and review were adopted, because at the time of the passage of the adjudication act, 1879, and for many years thereafter, the doctrine of priority in the use of water was not fully developed; and to have given the statutory decree at once the force and effect of a conclusive judgment *in rem* would have been contrary to the best interests of the state, as they require an economical use of water to the end that the largest acreage may be brought under cultivation. (49) After the expiration of two years the decree cannot be reopened by any party thereto, in the absence of fraud. (50) But a party, by failing to apply for a reopening, does not thereby waive his right to appeal. (51) There is another section (52) in the Colorado statute which establishes a different period of limitation. It provides in effect that nothing in the act of which it is a part or in any decree rendered under its provisions shall prevent any person, association or corporation from bringing or main-

(48) 1 Mills' Ann. Stat., §2425; *post*, §702.
(49) Louden Irr. C. Co. v. Handy D. Co., 22 Colo. 102, 43 P. 535 ('95).
(50) New Mercer D. Co. v. Armstrong, 21 Colo. 357, 40 P. 989 ('95); Boulder & Weld Co. D. Co. v. Lower Boulder D. Co., 22 Colo. 115, 43 P. 540 ('96); Daum v. Conley, 27 Colo. 56, 59 P. 753 ('99); Crippen v. X. Y. Irr. Co., 32 Colo. 447, 76 P. 494 ('04).
(51) Child v. Whitman, 7 Colo. App. 117, 42 P. 601 ('95).
(52) 1 Mills' Ann. Stat., §2434; *post*, §711.

taining any suit hitherto allowed in a court having jurisdiction, to determine the claim of priority of right, at any time within four years after the rendering of the final decree, and that after the lapse of four years such parties shall be deemed to have acquiesced in the decree and they shall be forever barred from setting up any claim to the contrary. This section (53) does not apply to parties to the former proceeding who have failed to avail themselves of the opportunities afforded for rehearing and review by the other sections of the statute, (54) unless the right of action grows out of matters arising subsequent to the decree. (55) These rights, under the four-year limitation, may only be exercised by those not parties to the former proceeding, and the fact that a party did not file his claim for water previous to the adjudication, or a petition for a reopening within two years, does not raise the legal presumption that he had no rights of appropriation, or that he intended to waive any of his rights to an adjudication thereof. (56) The petition or application for rehearing must state facts, showing that the party has been aggrieved, to enable the court to determine by an examination of the petition whether, if the facts therein alleged are true, the decree should be amended or modified. (57) The four-year limitation does not apply in a proceeding to complete the proof of an appropriation by the grantee of the water rights of a party to the former decree, whose priority right in point of time was determined therein, the quantity of the appropriation, however, having been conditional because the canal through which it was made was incomplete

(53) 1 Mills' Ann. Stat., §2434; *post*, §711.

(54) Handy D. Co. v. So. Side D. Co., 26 Colo. 333, 58 P. 30 ('99); Crippen v. X. Y. Irr. Co., 32 Colo. 447, 76 P. 494 ('04).

(55) Montrose C. Co. v. Loutsenhizer D. Co., 23 Colo. 233, 48 P. 532 ('96).

(56) Greer v. Heiser, 16 Colo. 306, 26 P. 770 ('91); Montrose Canal Co. v. Loutsenhizer D. Co., 23 Colo. 233, 48 P. 532 ('96).

(57) Crippen, etc., Co. v. Burroughs, 27 Colo. 155, 60 P. 487 ('00); Rio Grande L. & C. Co. v. Prairie D. Co., 27 Colo. 255, 60 P. 726 ('00); Peterson v. Durkee, 15 Colo. App. 258, 62 P. 370 ('00). For facts upon which a revision and modification of a decree were made, see Magill v. Hyatt, 20 Colo. App. 524, 80 P. 472 ('05).

when the decree was rendered. (58) A party who knowingly and intentionally fails to inform the court of his objections to the decree at the time it is rendered, will not be permitted afterwards to file such objections, even within the two years prescribed by statute. (59)

§ 141. Appeals in Colorado.

Any of the parties to the action in which the decree was entered may appeal from the district court to the supreme court. (60) Prior to the recent consolidation of the court of appeals with the supreme court, it was held that the latter had jurisdiction of appeals involving water rights, as a water right is a freehold estate within the meaning of Mills' Ann. Code, §388, regulating the jurisdiction of appeals to the supreme court. (61) The mode of taking appeals in these adjudication proceedings being regulated by statute, the provisions of the code of civil procedure relative to appeals do not apply. (62) The supreme court in all cases wherein any part of the decree appealed from is reversed, and in which it is practicable, shall render such a decree as should have been rendered by the district court, or direct in what manner the decree of that court should be amended. (63)

(58) Waterman v. Hughes, 33 Colo. 270, 80 P. 891 ('05). See, also, Larimer and Weld Irr. Co. v. Wyatt, 23 Colo. 480, 48 P. 528 ('97).

(59) Rio Grande L. & C. Co. v. Prairie D. Co., 27 Colo. 255, 60 P. 726 ('00). In this case a petition was filed within the two years, and the court made an order reopening the decree, and caused notice to be served on all interested parties; later and after the two-year period had expired, and in response to the notice, others than the original petitioners filed exceptions to the decree, and it was held that the court erred in entertaining the petitions and exceptions filed by others after the two years had elapsed.

(60) 1 Mills' Ann. Stat., §2427; *post*, §704.

(61) Wyatt v. Larimer and Weld Irr. Co., 18 Colo. 298, 33 P. 144 ('93); Daum v. Conley, 27 Colo. 56, 59 P. 753 ('99); La Junta & L. C. Co. v. Ft. Lyon C. Co., 25 Colo. 515, 55 P. 728 ('98). See, also, *ante*, §129, defining water rights.

(62) Daum v. Conley, *supra*; Upper Platte & B. C. Co. v. Ft. Morgan R. & I. Co., 27 Colo. 214, 60 P. 484 ('00). See Means *et al.* v. Stow, 31 Colo. 282, 73 P. 48 ('03); Means v. Gotthelf, 31 Colo. 168, 71 P. 1117 ('03).

(63) See Great Plains W. Co. v. Lamar C. Co., 31 Colo. 96, 71 P. 1119 ('03); Croke v. Am. Nat. Bank, 18 Colo. App. 3, 70

The time in which an appeal should be taken is not fixed by statute, but it has been held that since an appeal is not a new action, but a continuation of the original, the appeal must be taken within the two years provided for reopening. (64) After the judge of the district court has signed the order allowing the appeal, the time in which successive steps must be taken is governed by statute, and these provisions are mandatory and the supreme court cannot grant an extension, but must dismiss the appeal if a motion for that purpose is made. (65) A party does not waive his right to an appeal by applying for a rehearing and review of the decree in the trial court. (66) The statute (67) authorizes an appeal from adjudication proceedings only by the parties representing a ditch, which means the owners or persons controlling the ditch, and does not give an appeal to all persons interested in the ditch as water consumers. The consumers are not entitled to appeal because of the failure of the owner of the ditch to perfect its appeal, where such failure is due to a mistake in the procedure regulating the appeal, and not to fraud or intentional neglect of its consumers. (68)

P. 229 ('02). See, also, Means v. Stow, 31 Colo. 282, 73 P. 48, ('03); Magill v. Hyatt, 20 Colo. App. 524, 80 P. 472 ('05).

(64) Upper Platte & Beaver Canal Co. v. Ft. Morgan Res. & Irr. Co., 27 Colo. 214, 60 P. 484 ('00).

(65) Baer Bros. L. & C. Co. v. Wilson, 32 Colo. 500, 77 P. 245 ('04).

(66) Daum v. Conley, 27 Colo. 53, 59 P. 753 ('99); Kerr v. Dudley 26 Colo. 457, 58 P. 610 ('99). The action of the district court in overruling the appellant's exceptions and approving the decree, is the only question considered on appeal.--Kerr v. Dudley, 26 Colo. 457, 58 P. 610 ('99) The filing of the statement of claims with the trial court is the only method by which the allowance of an appeal can be procured, and an order fixing a time to file a bond, entered before the statement is filed, is of no effect.--Daum v. Conley, 27 Colo. 56, 59 P. 753 ('99). Objections and exceptions taken on the hearing of the referee's report are a part of the record and cannot be stricken therefrom on appeal.—*Id.* It is only necessary to incorporate in the bill of exceptions all the evidence bearing upon the particular point sought to be reviewed.—Catlin Land & C. Co. v. Burke, 22 Colo. 419, 45 P. 387 ('96).

(67) 1 Mills' Ann. Stat., §2427. See, also, *ante*, §118.

(68) Randall v. Rocky Ford D. Co., 29 Colo. 430, 68 P. 240 ('02).

§ 142. Court Adjudication in Other States.

In Idaho, (69) North Dakota, (70) Oklahoma, (71) South Dakota, (72) Utah, (73) Washington, (74) Oregon, (75) and Kansas, (76) the Colorado system of adjudication by the courts is followed. The fundamental difference between the Colorado procedure and that of the states and territories just mentioned, is the fact that in Colorado the owner of the ditch is the party, and if it be a common carrier, the consumer is merely a witness and the decree is rendered in the name of the ditch. In the other states mentioned, however all claimants of a right to use water are made parties, and a certificate is issued in the name of the claimant, showing the amount of water to which he is entitled and the land upon which it is to be used. In these respects these states follow the Wyoming system of adjudication. (77) But inasmuch as the courts have the original jurisdiction they in that respect follow Colorado.

In Utah (78) the state engineer is required to make a survey of each water source of the state, beginning with those most used by appropriators. He files his report containing all the data obtainable with the clerk of the district court which then has jurisdiction to determine the priority rights of those obtaining water from that source. A notice is published requiring all claims to be filed within six months, and a failure to file a statement of claim within that time forever bars the claimant, except that upon certain conditions he may be allowed to file his statement of claim within one year. After the expiration of six months the court may appoint a referee or referees, not exceeding three, to take the testimony and make

(69) Sess. L. '03, p. 246, §§33-38.
(70) Rev. Codes '05, §§7617-7621.
(71) Sess. L. '05, p. 276, §§5-8.
(72) Sess. L. '05, p. 204, §§14-18.
(73) Laws '05, p. 148, §§11-25.
(74) Pierce's Code '05, §5873, *et seq.*
(75) Bellinger & Cotton's Ann. Codes and Stats., §5043.
(76) Gen'l Stat. '05, §3907.
(77) *Post*, §143.
(78) Laws '05, p. 148, §§11-25.

their findings. The referees have practically the same power and perform about the same duties as in Colorado. (79) The decree, instead of running to the ditch or owner thereof, as it does in Colorado, runs to the person entitled to the use of the water, that is, to the consumer, but contains the other important facts required in Colorado. (80) In Utah should any claimant object to the claim made by any other, he must file a written statement of his grounds of contest with the clerk of court, and the referee or referees then fix a time for hearing the same.

In Idaho a suit is brought by the water commissioner and notice published as in the other states. The supreme court, in passing upon this act, (81) held that section thirty-four, pertaining to the institution of the suit and the service of summons by publication, is unconstitutional. This decision is based upon the fact that the state and federal constitutions prohibit the deprivation of private property without due process of law, which requires reasonable and actual service upon all known defendants who reside in and can be found in the county where the suit is brought; that a service by publication is not due process of law; that section thirty-five, as to the costs of the proceeding being paid by the county, is unconstitutional because it is not within the authority of the legislature to compel the county to pay the costs, disbursements and attorney's fees in a suit to settle and adjudicate the private rights of persons in and to the use of waters appropriated under the laws of the state; that section thirty-six, providing the duties of the water master during the pendency of such proceeding, being dependent upon sections thirty-four and thirty-five, is also unconstitutional. The court stated that the remaining portions of the act were attacked, but did not say upon what grounds, and declined to pass upon any but the above three sections declared unconstitutional, as they controlled the pending action. This decision practically destroys the efficiency of the Idaho statute and, compared with the Colorado

(79) *Ante*, §138.
(80) *Ante*, §139.
(81) Sess. L. 1903, p. 246.

and Wyoming decisions, (82) would seem to be a narrow view of the right of the state under its police power to control the diversion of water from the natural stream, and the adjudication of the rights of those diverting or using it. Acts providing for service of notice by publication in other states have been sustained on the ground that the proceeding was not an action at law, but a purely ministerial act to ascertain for public record the facts as to existing rights. (83) In North Dakota, Oklahoma, South Dakota and Washington, the action is brought by the attorney general. In Colorado, as we have seen, (84) a copy of a portion of the decree is issued to the claimant, whereas a formal certificate is issued in these other states and territories, in duplicate, one copy being for record with the county recorder and the other with the state engineer. In each jurisdiction appeals may be taken by any claimant feeling himself aggrieved, and the adjudication brought before the appellate tribunal for review. In most of these states the acts now in force, providing for the adjudication of water rights and priorities, are of such recent date that the Idaho case (85) is the only one wherein they have been construed. In Washington, by the act of 1890, (86) a proceeding very similar to that of Colorado is provided, while in Oregon (87) it is provided that in any suit thereafter brought to protect any rights to water, all parties using water from the same stream or source may be made parties and the rights of all established in the one decree. In Kansas no procedure is provided, but jurisdiction is conferred upon the district courts to ascertain and settle the several rights and priorities of the parties interested. (88)

(82) *Post*, §143; *ante*, §53.
(83) Farm Inv. Co. v. Carpenter, 9 Wyo. 110, 61 P. 258 ('00); Farmers' Irr. D. v. Frank, — Neb. —, 100 N. W. 286 ('04). For Colorado cases in point, see *ante*, §139, note 39.
(84) *Ante*, §139.
(85) Bear Lake Co. v. Budge, 9 Ida. 703, 75 P. 614 ('04).
(86) Pierce's Code, §5873, *et seq.*
(87) Bellinger & Cotton's Codes and Stats., §5043. Form of decree discussed in Seaward v. Duncan, — Ore. —, 84 P. 1043 ('06).
(88) Gen'l Stat. '05, §3907.

Montana has a similar provision to that of Oregon, but no special procedure is provided. (89) The cases in the note will indicate the form of procedure and the rulings made in the several jurisdictions mentioned under earlier statutes. (90)

(c) *The Wyoming System of Adjudication.*

§ 143. Adjudication by Board of Control.

As we have seen, the state of Wyoming, after trying the Colorado system with little satisfaction, (91) in 1891 adopted a new and distinctive method governing the appropriation of water from the natural stream or source, and regulating its use. (92) By its constitution and statutes the general supervision of the waters of the state is vested in the state engineer and a board of control. Among the duties devolving upon this board is that of adjudicating the priorities of appropriation from the various water systems of the state. These adjudications were commenced by the board of its own motion and continued as rapidly as possible until completed. The state engineer was required to survey and measure the different streams, as well as the ditches and canals taking water therefrom. Complete maps and records showing all the data obtainable were to be kept of record in his office. The board of control was composed of the state engineer and the superintendents of the four water divisions. When the rights of appropriators from any stream and its tributaries were to be adjudicated, the superintendent sent out notices by mail, at the same time publishing the notice in newspapers circulating in that vicinity, to the effect that on the date and at the place named in the notice he would appear and receive "proofs of appropriation" *from those using the waters of that stream.* These proofs

(89) 1 Mont. Codes, Part II., §1891.
(90) Kirk v. Bartholomew, 3 Ida. 367, 29 P. 40 ('92); McGinness v. Stanfield, 6 Ida. 372, 55 P. 1020 ('98); Nephi Irr. Co. v. Vickers, 15 Utah 374, 49 P. 301 ('97); Minnie M. R. & I. Co. v. Grames, 29 Utah 225, 81 P. 893 ('05).
(91) Farm Inv. Co. v. Carpenter, 9 Wyo. 110, 61 P. 258 ('00).
(92) *Ante*, §53.

were sworn statements of the appropriator (93) or his agent, showing the name of the appropriator, his address, the name of the ditch, its size, the date of its construction, the description of the lands irrigated thereby, the date when water was first used, the number of acres irrigated the first and each succeeding year, the character of crops raised and the portion of the year when the water was needed. The superintendent of the division was then expected to examine the premises described and to endorse the result of his examination on the proof. After these proofs were received, another time and place was fixed, due notice of which was given, when the superintendent would open for inspection the proofs taken by him, and the parties interested in the waters of that stream system could then inspect the proofs and ascertain what claims to the use of water had been made by others. It is provided that if any party or parties interested desire to combat or "contest" the claim made by any other or others, he or they must within fifteen days after the proofs have been opened for inspection file with the superintendent a written notice of contest, specifying the grounds therefor and verified by the party or his attorney. Where no contest is filed the superintendent returns the proofs taken by him with the result of his inspection, to the board of control at its next session, and the board, from the facts therein set forth, makes its decree. Where a contest is filed the superintendent, after due notice, hears and transcribes the testimony and returns the evidence so taken to the board. The parties may appear by attorney before the board at the time it is considering the evidence taken in the contest and present arguments for their respective sides. After the decree is made by the board a certificate is issued to the appropriator, (93*a*) specifying that he is en-

(93) The use of the word "appropriator" here means the consumer, and not a ditch owner, unless such owner uses the water carried in the ditch or canal himself, and the same rule applies where the ditch is owned by a corporation.

(93*a*) It was recently contended before the board of control, in an unreported case, that the certificate should be issued to the ditch company, but the board wisely held that the ditch

titled to the use of a certain quantity of water from a certain source, through a certain ditch with a specific priority number, for use upon certain lands therein described. If it was the intention of the legislature to make the water unchangeably appurtenant to the land, the court has taken a different view of the statute. If the framers of this act supposed that the board of control would have exclusive jurisdiction in the adjudication of priorities, the supreme court has disappointed them, for in the case of Farm Investment Co. v. Carpenter, (94) it is held that an appropriator who does not present his claim to the board as outlined above, even after notice of the proceedings, was not estopped from asserting his right in the district court, as the proceedings of the board awarding priorities to others were not adverse to his claim, and therefore not *res judicata* as to him.

The court also held that notwithstanding the statutory proceeding provided for, the legislature did not take away the jurisdiction of the courts to hear and determine the rights to the use of water, and that the courts could still take original jurisdiction of such controversies. The courts would not undertake to determine anew the rights of parties which, as between themselves, have been settled by the decree of the board of control, at least in the absence of fraud. In this case the constitutionality of the act was attacked on several grounds, among them being that it conferred judicial power upon a non-judicial board and that the service of notice by registered mail was not due process of law. As to the first objection the court held that the duties of the board of control are primarily administrative, it having *quasi*-judicial powers, but that the proceeding being initiated by the board is to determine the priority right of the various claimants, in which no judgment is awarded, hence the jurisdiction of the courts is not destroyed As to the second contention, it was held that the service of

company merely had the right to convey the water and that the certificate should be made to the consumer who, by his use, made the appropriation. *In re* adjudication Black's Fork Canal, Div. No. 4.

(94) 9 Wyo. 110, 61 P. 258 ('00).

notice by registered mail is sufficient to constitute due process of law, and the Wyoming court sustained the act as within the constitution and the intention of its framers.

Provision is made for rehearings before the board of control and appeals from the board to the district and supreme courts. (95) The provisions of the statute relating to appeals are mandatory and must be strictly complied with. (96)

§ 144. Adjudication by Boards and Administrative Officers in Other States.

The Wyoming system has been followed very closely by the state of Nebraska. (97). The same attack was made upon the constitutionality of the act in that state as was made in Wyoming. The court, apparently satisfied with the reasoning in the case of Farm Inv. Co. v. Carpenter, (98) held the act to be constitutional. (99) The adjudication in Nebraska is made by the board of irrigation. New Mexico, by the act of 1905, (100) provides that all adjudications shall be made by "the board of control," and the procedure is very similar to that of Wyoming. In Nevada the adjudication is made by the state engineer, (101) who sends out blanks containing questions very similar to those used in the proofs of appropriation in Wyoming, (102) the appropriator being required to answer such questions under oath. In addition the state engineer must make an investigation and survey of the stream, canals, ditches and irrigated lands, and from all of the facts thus obtained fix the priority rights and issue the certificate to the appropriator. From his determination an appeal may be taken to the courts.

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(95) Rehearing, Rev. Stat. Wyo. '99, §883; Appeals, *Id.*, §§874-882.
(96) Daley v. Anderson, 7 Wyo. 1, 48 P. 839 ('97).
(97) Comp. Stat. '05, §§6424-6449.
(98) 9 Wyo. 110, 61 P. 258 ('00); *ante*, §143.
(99) Farmers' Irr. Dist. v. Frank, — Neb. —, 100 N. W. 286 ('04).
(100) Laws '05, p. 280, §§29-36.
(101) Laws '01, p. 72, §§9-12.
(102) *Ante*, §143.

(*d*) *Non-statutory Adjudications.*

§ 145. Non-statutory Court Adjudications.

The acts of 1879 and 1881 of Colorado, (103) providing, as they do, a complete proceeding for the determination of rights of priority to take water from the natural stream, do not divest the right of the appropriator to bring an independent action as he might have done prior to the adoption of such statutes. It is especially provided by the act of 1881 (104) that nothing in this act or in any decree rendered under the provisions hereof, shall prevent any person, association or corporation from bringing or maintaining *any suit or action whatsoever* hitherto allowed in any court having jurisdiction, to determine any claim of priority, etc. This independent action must, however, be brought within four years after the final decree is rendered, or the party will be forever barred. Such an action can only be brought by one who was not a party to the statutory adjudication, or if a party, his right of action must grow out of matters arising subsequent to the rendition of the decree. (105) It was held, however, in the case of Nichols v. McIntosh, (106) that an adjudication of priorities under the irrigation acts will not, without due process of law, deprive a person of his constitutional or vested rights—such as prior rights to the use of water; nor will such rights be affected by the lapse of time so long as they are not actually denied, abridged or interfered with by the enforcement of the decree entered in such proceedings. This line of reasoning led the supreme court of Wyoming to hold that an adjudication by the board of control in that state did not prevent one not a party to the board proceeding from bringing an action in the district court to determine his rights. (107) In bringing such an action the plaintiff may join the state engineer, super-

(103) 1 Mills' Ann. Stat., §2399 *et seq.*; *post*, §672 *et seq.*
(104) 1 Mills' Ann. Stat., §2434; *post*, §711.
(105) Montrose C. Co. v. Loutsenhizer D. Co., 23 Colo. 223, 48 P. 532 ('96); Handy D. Co. v. South Side D. Co., 26 Colo. 333, 58 P. 30 ('99).
(106) 19 Colo. 22, 34 P. 278 ('93).
(107) Farm Inv. Co. v. Carpenter, 9 Wyo. 110, 61 P. 258 ('00).

intendent and water commissioner as parties defendant, if they are attempting to distribute the water in violation of his rights, (108) and may join all junior appropriators whenever the result of their acts, whether joint or several, deprives him of his rights. (109)

§ 146. Different Methods and Suggestions.

The supervising engineer, U. S. Reclamation Service, Mr. Morris Bien, in a letter to the author of Wiel "On Water Rights," (110) says:

"The adjudications of the courts upon the subject of water rights should bear a closer relation to the physical conditions than was the case until within recent years, and even now there are frequent decisions which do not take fully into account the facts regarding water supply and the needs of the irrigators."

Under the early customs and statutes, both the carrier and the appropriator put on record a claim to as much water as they thought might possibly be used. At that time it was not known with any certainty how much service water would perform, nor how much would be needed to successfully produce crops of different kinds upon a given area. Therefore, in almost every instance, at least under the Colorado method of adjudication, the carrier, using the consumer as its witness, claimed far more water than was necessary for the consumer's actual needs; and the courts, being as unfamiliar with the problem as most of the carriers and water users, often awarded priorities to the various ditch claimants in such quantities as to decree more water by three or four times than flowed in the given stream during its wildest floods. These decrees have led to a large amount of litigation that by proper prior precautions could easily have been avoided. By the Colorado method of adjudication of diversion from the natural stream or source, no check whatever in the 1879 and 1881 adjudicative statutes was placed upon carrier or consumer. Later

(108) Farmers' Ind. D. Co. v. Agri. D. Co., 22 Colo. 513, 45 P. 44 ('96).
(109) Saint v. Guerrerio, 17 Colo. 448, 30 P. 335 ('92).
(110) Wiel "On Water Rights," p. vi.

it was merely provided that the state engineer might reject the maps and statements tendered for filing if they were not in the form required by law. In this way the carrier was practically the sole judge of whether or not there was any unappropriated water in the stream from which it sought to obtain a supply. The fact that the Colorado statutes relating to the adjudication of priorities in the taking of water from the natural stream have remained practically unchanged for many years may be thought to be an indication that the irrigation officers and legislatures, as well as the people, are by no means dissatisfied with their present system and its results. It would probably be nearer the truth, however, to say that it has long been recognized that the great and important streams of Colorado have heretofore been fully adjudicated under the old law, and that whatever harm has been done is past rectification by any change either slight or radical in the adjudication statutes. But there is plenty of adverse criticism of the old ditch decrees; and incorporated irrigation districts and various reservoir systems are gradually, but perceptibly, through rotation, exchange and otherwise, effecting important modifications in the early maladjustments of the ditch decrees. The Wyoming system, (111) while in the opinion of those making a study of these questions superior to that of Colorado, nevertheless has some defects that can probably be changed for the better. Among its strong points is the general power conferred upon the state engineer and board of control, and especially the power conferred upon the engineer, to refuse permission to construct diverting works to tap any of the water systems of the state whenever the records of his office show that there is no unappropriated water. In adjudicating the rights of priority the consumer is the real party, receiving the certificate of appropriation in his own name instead of being a mere witness—

(111) The Wyoming system of control is known as the "Ellwood Meade Law." Mr. Meade was at that time state engineer of Wyoming. This is the first system or code with which the author of this book is acquainted that seems to expressly aim at a complete centralized control. See, also, *ante*, §§53, 143.

as in Colorado—to assist the carrier in securing a decreed priority for its own ditch. The claimants to the use of water are put to very little trouble or expense unless their claims are contested or they desire to contest the claims of others. The Wyoming system of adjudication reduces litigation to the minimum and centralizes the control of the waters of the state in the hands of one officer who, with large discretionary powers, usually is and should be an hydraulic expert.

The Wyoming act is weak in that it does not confer exclusive original jurisdiction upon the board, but leaves it at the option of the appropriator whether or not he will appear before the board or submit his rights to the courts. (111*a*) If this system is continued, this feature should be remedied, if necessary, by a constitutional amendment, and the exclusive original jurisdiction of adjudications vested in one tribunal.

Another plan for water distribution and control is now proposed by Morris Bien, (112) the engineer mentioned in the first part of this section, which embodies many of the best features of the old systems, with many new and suggestive ideas. But all of his proposed legislative provisions, as the author of this book believes, are not of equal merit. He would leave to the courts the adjudication of rights of priority in suits to be brought by the attorney-general, except where private parties had already commenced such an action. (113) The feature suggested in Bien's proposed code, (114) requiring the applicant for a

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(111*a*) Farm Inv. Co. v. Carpenter, 9 Wyo. 110, 61 P. 258 ('00).

(112) Bien's proposed code embraces the basic principle of the Wyoming system and code, viz: centralized control. The codes adopted in 1903 and 1905 (see *ante*, §53) were modeled upon the Bien Code idea and embrace almost all if not all of its best features. These codes can be traced through Mr. Bien back to the various conferences in the West of irrigation experts and engineers, and ultimately to the principal features of the Meade law of Wyoming. See *ante*, §§53, 143.

(113) "Irrigation," published at Denver, Colo., issues of May, June, July and August, 1906. See our suggestion later in this section as to a "Water Court."

(114) *Id.*

permit to advertise the fact that an application has been filed, giving the important details of the enterprise and the date and place when and where the state engineer will take it up for consideration, is one now in use in some of the states, and should be copied. It relieves the engineer from a complete dependence upon his records, and gives other parties interested in the waters of that particular water system an opportunity to protest against the issuance of a permit and to show wherein it would not be for the public good.

The Canadian law (115) requires the application to show the financial standing of the appropriators. This feature, particularly with reference to applications by corporations or associations for the purpose of conveying water to be used by others, would enable the state engineer to do much to prevent wild-cat schemes and boom companies. This Canadian act also provides for three classes of appropriations viz: low water, high water and flood stage, which informs the appropriator in advance of the character of his right and the period when he is entitled to water. Then the act and the "licenses" issued to the appropriator attach the use of the water to specific tracts of land, and it cannot be used upon any other. These features of the Canadian act and the proposed Bien code, combined with the Wyoming system of adjudication, would make a thorough working system, provided the state engineer and members of the controlling board were appointed for their special fitness and not for political service.

Experience has probably taught that the relative rights of carriers and their respective consumers to water from the natural stream can be ascertained and adjudicated with less friction and more satisfactory results by boards of adjudication than by the ordinary proceedings in court. If a new and general irrigation code were to be adopted it would seem advisable, in view of the importance of this subject in the arid and

(115) "The Northwest Irrigation Act." (Act parliament, 1894). From this and other pamphlets it will be seen that Canada is making a scientific study of the irrigation questio.., and is well up to Wyoming in progressive ideas.

semi-arid West, to provide for a special tribunal which would be in fact, if not actually so-called, a water court. It should have exclusive original jurisdiction in the adjudication of the relative priority rights from the natural stream of all carriers and appropriators. This court should consist of five members, including the state engineer, who should be its president. The other members should consist of two irrigation engineers, one practical irrigator and one lawyer who is especially versed in irrigation law. It should be a migratory court, holding its sessions at the most convenient point for the carriers and appropriators of the water system being adjudicated. As a body it could view the premises affected by any contest, or designate one or more of its members to make an inspection and report. A water court so constituted, whose members do not come in personal contact with the carriers or appropriators, except during an adjudication, and who do not have official duties to perform constantly in any particular section or division of the state, is far less liable to have its opinions warped or biased than are boards composed of division superintendents, whose duties bring them continually in contact with the carriers and appropriators of their respective divisions. The members of the water court should be experts on the diversion, appropriation and use of water, and thoroughly qualified to consider the physical conditions of the locality of use, in connection with the evidence introduced by the claimants, and to render decrees that would secure from water its highest possible duty out of every stream. Whether appeals should be allowed to other courts is a debatable question. There is great virtue in settling water disputes as quickly and inexpensively as possible. Appeals are often a legal luxury to be enjoyed only by the prosperous and rich. Such a tribunal in some states would have to be created perhaps by constitutional amendment. Of course the expense of maintaining it would be considerable, but if it gives results of the highest order the subject is too important to allow the matter of expense to assume anything more than secondary consideration.

CHAPTER 28.

ADJUDICATIONS AFFECTING WATER OR WATER RIGHTS.

§ 147. Purpose of Relief.

Not referring now to the adjudication of the right to take water from the natural stream, the actions in general that result in an adjudication of water rights are usually the result of some interference with the plaintiff's actual or supposed prior rights, either by the defendant's diversion of the water or by his refusal to furnish it, and the relief asked is usually either the restraint or the compulsion of the defendant and damages for the injuries caused. But before any relief can be granted, it is necessary to ascertain the priority rights of the respective parties, and these, when ascertained, are established by the decree as a guide to future action and to prevent further controversies. (116)

§ 148. Actions to Protect Appropriations—Judges Inspecting Premises.

The new doctrine of appropriation did not develop any specially new methods of procedure, and but few new causes of action have been introduced, such as the statutory proceeding for the adjudication of the right to take water from the natural stream for irrigation, (117) and for purposes other than irrigation (118) and changing the point of diversion. (119) The right to the use of water, being in all jurisdictions a property right, it is protected by the same actions as are other kinds of property. Thus far the principal difficulty has been to choose the right kind of action and to adjust its particular form to the facts that enter into a water controversy; also to determine the parties necessary to an adjudication of this peculiar form of property. In many

(116) Burnham v. Freeman, 11 Colo. 601, 19 P. 761 ('88); Arnett v. Linhart, 21 Colo. 188, 40 P. 355 ('95).
(117) *Ante*, §§137, *et seq.*
(118) *Ante*, §§39, 45.
(119) *Ante*, §46.

cases the trial judge has made a personal examination of the premises and has used the information thus gained in aiding him in formulating a decree; none of these cases have been reversed on this ground, but the appellate courts have spoken of this course with approval and as adding weight to the opinion and findings of the trial court. (120) The different actions and the parties, pleadings and other questions peculiar to water rights will be briefly discussed in the following sections.

§ 149. Pleading an Appropriation—General Points in Practice.

In all actions wherein the plaintiff is relying upon and seeking to establish his priority of appropriation, he cannot rely upon the bare allegation of a prior appropriation, for that is a legal conclusion. He must aver the facts showing such prior appropriation, (121) and a petition failing to state such facts is demurrable. (122) It is not necessary for the plaintiff

(120) Winter v. Fulstone, 20 Nev. 260, 21 P. 201 ('89); Leonard v. Shatzer, 11 Mont. 422, 28 P. 457 ('92); Power v. Switzer, 21 Mont. 523, 55 P. 32 ('98); Medano Ditch Co. v. Adams, 29 Colo. 315, 68 P. 431 ('02); Promontory Ranch Co. v. Argile, 28 Utah 398, 79 P. 47 ('04). See *ante*, §70, note 8.

(121) Farmers' H. L. C. & R. Co. v. Southworth, 13 Colo. 111, 21 P. 1028 ('89). In this case, speaking of the allegations in the complaint, Elliott, J., said: "In this case it is averred in the complaint, in substance, that the plaintiff has a priority to the use of water through the ditch of the defendant company for the irrigation of his lands, antedating the priorities of the other defendants. Even if this averment, which would seem to be only a legal conclusion, should be held sufficient, there still remains the substantial defect that the complaint nowhere states that the plaintiff has in fact been accustomed to take and apply the water without waiver or abandonment, or at all, to the irrigation of his crops or trees. It was error, therefore, to overrule the demurrer." The stress, real or imaginary, that seemed to require or justify the announcement of such a rule has long since passed. Waiver or abandonment should be pleaded as a defense. The principle announced by the supreme court in discussing the joinder of parties in Farmers' Ind. Ditch Co. v. Agricultural Ditch Co., 22 Colo. 513, 45 P. 444 ('96), would seem to have disapproved of such a narrow rule. In this case Hayt, J., at p. 524, said: "Courts will never sanction a practice which imposes an impossible or even *an unreasonable* requirement upon litigants."

(122) Farmers' Highline C. & Res. Co. v. Southworth, 13 Colo. 111, 117, 21 P. 1028 ('89). In this case Hayt, J., says:

to state in his complaint how or of whom he acquired his superior right to the use of water, (123) but he must show in his pleading that the defendant has unlawfully deprived him of it. (124) It was held by the Colorado court of appeals, (125) that a complaint by a ditch company for itself and on behalf of its stockholders and the users of water from its ditch, in an action to restrain the wrongful diversion of water, should state the names of the users of water from its ditch, the date of their respective appropriations, the amount of land for which the water was needed and all facts necessary to show valid prior appropriations that had not been waived or abandoned. The supreme court reversed the decision of the court of appeals on this point, holding that a practice which imposed an impossible or even unreasonable requirement upon litigants was not to be sanctioned, and that such facts need not be pleaded. (126) It is necessary to plead facts showing the amount of water appropriated, (127) as well as the facts showing adverse possession and user. (128) The plaintiff's wrongful act constitutes no defense to an action to restrain defendant from diverting all of the water of the stream. (129) The sufficiency of a canal company's excuse for a failure to deliver water according to agreement is a question for the jury. (130) A

"The plaintiff expressly alleges that he has a priority, and that the defendant's right is subsequent in point of time to such priority. Either this is a good allegation or it is not. * * * In my opinion it is an averment of a mere legal conclusion; and it is well settled that the statement of a legal conclusion, resulting from certain facts, without stating the facts, will not meet the code requirement. The complaint should be held insufficient." See, also, Church v. Stillwell, 12 Colo. App. 43, 54 P. 395 ('98).

(123) Downing v. Agricultural D. Co., 20 Colo. 546, 39 P. 336 ('95).

(124) *Id.*

(125) Farmers' Ind. D. Co. v. Agri. D. Co., 3 Colo. App. 255, 32 P. 722 ('93).

(126) Farmers' Ind. D. Co. v. Agri. D. Co., 22 Colo. 513, 45 P. 444 ('96).

(127) McLure v. Koen, 25 Colo. 284, 53 P. 1058 ('98).

(128) Rominger v. Squires, 9 Colo. 327, 12 P. 213 ('86).

(129) Arnett v. Linhart, 21 Colo. 188, 40 P. 255 ('95).

(130) Rocky Ford Canal, Res. L. L. & Tr. Co. v. Simpson, 5 Colo. App. 30, 36 P. 638 ('94).

stipulation as to the respective appropriations of parties to a litigation will control, and not the evidence showing a contrary state of facts. (131)

§ 150. Injunction.

The equitable remedy of injunction (132) is the most common among the various forms of action in protecting property rights in water against such acts as materially diminish the quantity to which a party is entitled or deteriorate its quality for the use to which he desires to apply it. (133) This form of action is also used to abate nuisances arising from the maintenance or erection of dams, (134) ponds, (135) and other irrigation works. (136) Temporary writs of injunction may issue to restrain a trespass to a water right. (137) An action to restrain a wrongful

(131) Water Supply & Storage Co. v. Larimer and Weld Res Co., 25 Colo. 87, 53 P. 386 ('98).

(132) For Mandatory Injunction, see §155.

(133) Diminishing quantity by diversion—Phœnix Water Co. v. Fletcher, 23 Cal. 481 ('63); Hillman v. Newington, 57 Cal. 56 ('80); Spargur v. Heard, 90 Cal. 221, 27 P. 198 ('91); Harris v. Shontz, 1 Mont. 212 ('70); Salazar v. Smart, 12 Mont. 395, 30 P. 676 ('92); Shilling v. Rominger, 4 Colo. 100 ('78); Fuller v. Swan Riv. Placer M. Co., 12 Colo. 12, 19 P. 836 ('88); Platte Val. Irr. Co. v. Buckers Irr. Co., 25 Colo. 77, 53 P. 334 ('98); Lower Latham D. Co. v. Louden Irr. Co., 27 Colo. 267, 60 P. 629 ('00); Wold v. May, 10 Wash. 157, 38 P. 875 ('94); Roeder v. Stein, 23 Nev. 92, 42 P. 867 ('95); Nevada Ditch Co. v. Bennett, 30 Ore. 59, 45 P. 472, 60 Am. St. Rep. 777 ('96); Santa Rosa Irr. Co. v. Pecos River Irr. Co., — Tex. Civ. App. —, 92 S. W. 1014 ('06). Deteriorating quality—Golden Gate Hydraulic M. Co. v. Superior Ct. of Yubá, 65 Cal. 187, 3 P. 628 ('84); Glassell v. Verdugo, 108 Cal. 503, 41 P. 403 ('95); Larimer Co. Res. Co. v. People *ex rel.* Luthe, 8 Colo. 614, 617, 9 P. 794 ('85); Cushman v. Highland D. Co., 3 Colo. App. 437, 439, 33 P. 344 ('93); Suffolk Gold M. & M. Co. v. San Miguel Con. M. & M. Co., 9 Colo. App. 407, 418, 48 P. 828 ('97); City of Hutchinson v. Delano, 46 Kan. 345, 26 P. 740 ('91); Barton v. Union Cattle Co., 28 Neb. 350, 44 N. W. 454, 26 Am. St. Rep. 340 ('89).

(134) Strumbo v. Seeley, 23 Neb. 212, 36 N. W. 487 ('88); Hollenbeck v. Dingwell, 16 Mont. 335, 40 P. 863 ('95); Booker v. McBride, 16 Tex. Civ. App. 348, 40 S. W. 1031 ('97).

(135) Andrews v. Village of Steele City, — Neb. —, 89 N. W. 739 ('02).

(136) Lisonbee v. Monroe Irr. Co., 18 Utah 343, 54 P. 1008 ('98).

(137) Derry v. Ross, 5 Colo. 295 ('80); Copper King Co., Ltd., v. Wabash M. Co. [Cal.], 114 Fed. 991 ('02); Krause v. Ore. Iron & S. Co., 45 Ore. 378, 77 P. 833 ('04); Rodgers v. Pitt [Nev.], 129 Fed. 932 ('04).

diversion of waters cannot be maintained unless the plaintiff has a right to the waters of the stream of which he is being deprived by the defendant. (138) Injunction will lie to restrain the acts of a junior appropriator from a tributary of the main stream, (139) notwithstanding the fact that plaintiff's point of diversion is above the junction of the main stream and tributary. This is upon the theory that the diversion of the water of the tributary interferes with the flow of water to those below whose rights are superior to plaintiff's thus compelling plaintiff to make up the deficiency to his injury. (140) In a case between two riparian proprietors the United States circuit court held that where the water may be conveniently used by both, without strictly enforcing such right, a court of equity may refuse to issue an injunction. (141) The writ of injunction is frequently used to regulate the dealings of a ditch, canal or irrigation company with its stockholders and consumers. As we have seen, such a company is not permitted to stretch the term "estimated capacity" in selling rights to carry water through its ditch, but is confined to the quantity of water which it can obtain and deliver, (142) and the courts will restrain a company from selling such rights beyond its capacity. (143) For a discussion of what should be pleaded in an action against a ditch company to restrain it from delivering water to subsequent purchasers of stock, the reader is referred to the case of Downing v. Agricultural Ditch Co. (144) An injunction will be dissolved whenever the writ is ineffectual by reason of uncertainty, (145) and an injunction restraining the

(138) Platte Val. Irr. Co. v. Buckers Irr. Mill and Imp. Co., 25 Colo. 77, 53 P. 334 ('98).
(139) *Id.*
(140) Water Sup. & Stor. Co. v. Larimer & Weld Res. Co., 25 Colo. 87, 53 P. 386 ('98); reversing same, 7 Colo. App. 225, 42 P. 1020 ('95).
(141) Mason v. Cotton [Colo.], 4 Fed. 792 ('80).
(142) *Ante*, §121.
(143) Wyatt v. Larimer & Weld Irr. Co., 18 Colo. 298, 33 P. 144 ('93).
(144) 20 Colo. 546, 30 P. 336 ('95).
(145) McKenzie v. Ballard, 14 Colo. 426, 24 P. 1 ('90).

defendant from diverting water into a ditch or reservoir, because of its unsafe condition, does not prevent the defendant from cleaning the reservoir or ditch and repairing it, and then moving to dissolve the injunction. (146)

§ 151. Injunction—Parties.

All of the consumers from the same water system, junior in right to the plaintiff, may be joined as defendants whenever the result of their acts, either joint or several, deprives him of his rights or substantially interferes with the same. (147) Where it appears that, during the period complained of, other persons not parties to the action diverted water from the same stream to such an extent that it cannot be satisfactorily shown but that for the acts of the parties not sued no injury would have resulted, an injunction will not be granted. (148) All persons using water from the stream above the plaintiff should be made parties, because each contributes to plaintiff's shortage. (149)

All parties claiming prior rights should be made plaintiffs or joined as defendants with the parties having junior rights. (150) In an action between consumers and the ditch company, wherein co-consumers are joined as defendants with the company, all co-consumers should be joined, because in such an action the ditch company should not take sides and cannot represent the consumers not joined. (151) In an action between two ditch companies the company has such an interest in the subject-matter as will enable it to represent its stockholders or those receiving water through its ditch without their being

(146) Sylvester v. Jerome, 19 Colo. 128, 34 P. 760 ('93).
(147) Saint v. Guerrerio, 17 Colo. 448, 456 ('92), 30 P. 337; Woodruff v. North Bloomfield Gravel Min. Co. (The Debris Case), 16 Fed. 25, Cal. ('83); 1 Mills' Ann. Stat. §2256, notes 186-190; Mills' Ann. Code (ed. '05), §143, note 30; also p. 369t, note 265, etc.
(148) West Point Irr. Co. v. Moroni and Mt. P. Irr. D. Co., 21 Utah 229, 61 P. 16 ('00).
(149) *Id.*
(150) Farmers' High Line C. & Res. Co. v. White, 32 Colo. 114, 123, 75 P. 415 ('04).
(151) *Id.* See, also, Brown v. Farmers' High Line C. & Res. Co., 26 Colo. 66, 56 P. 183 ('99).

made parties to the action. (152) In a suit to enjoin a ditch company from diverting water in a stream from the use of prior appropriators for the use of subsequent appropriators, such subsequent appropriators, being the persons really interested, are necessary parties, and their absence is fatal to the validity of the decree. (153) Parties having separate interests in the stream cannot unite in an action for damages, although they may join to restrain future interference with their respective rights. (154) Parties having a right to divert the waters of a stream may join in a suit to restrain a third person from interfering therewith. (155) A plaintiff need not join his cotenants in common, either as parties plaintiff or defendant, (156) nor is it necessary for a riparian proprietor, seeking to restrain a diversion by an alleged prior appropriator, to join the other riparian proprietors as parties. (157) It is not necessary that the plaintiff be the owner of the ditch through which the water is conveyed, nor the land upon which it is used. If he has the right to use the water upon the land, he may maintain an action to enjoin one who wrongfully diverts the water, and he need not depend upon the owner of the ditch or land to protect his rights. (158)

(152) Farmers' Ind. D. Co. v. Agricultural D. Co., 22 Colo. 513, 529, 22 P. 513 ('96); Montrose Canal Co. v. Loutsenhizer D. Co., 23 Colo. 233, 234, 23 P. 233 ('96); Oregon Const. Co. v. Allen D. Co., 41 Ore. 209, 69 P. 455 ('02).

(153) Squires, Water Commissioner, v. Livesey, — Colo. —, 85 P. 181 ('06).

(154) Barham v. Hostetter, 67 Cal. 274, 7 P. 689 ('85); Ronnow v. Delmue, 23 Nev. 29, 41 P. 1074 ('95).

(155) Ronnow v. Delmue, 23 Nev. 29, 41 P. 1074 ('95); Beach v. Spokane R. & W. Co., 25 Mont. 379, 65 P. 111 ('01). A ditch company is not a necessary party to an action between consumers over the right to the use of a certain water right from the ditch of the company—Gutheil Park Inv. Co. v. Montclair, 32 Colo. 420, 76 P. 1050 ('04).

(156) Union Mill Co. v. Dangberg [Nev.], 89 Fed. 73 ('97); Crowder v. McDonald, 21 Mont. 367, 54 P. 44 ('98); Miller & Lux v. Rickey [Nev.], 127 Fed. 573 ('04); Rodgers v. Pitt [Nev.], 129 Fed. 932 ('04).

(157) Rincon W. & P. Co. v. Anaheim Union W. Co. [Cal.], 115 Fed. 543 ('02).

(158) Clifford v. Larrien, 2 Ariz. 202, 11 P. 397 ('86); Barkley v. Tieleke, 2 Mont. 61 ('74). A defect of parties must be raised by demurrer or answer, or it is waived—Medano D. Co. v. Adams, 29 Colo. 315, 68 P. 431 ('02).

§ 151, Injunction—Parties.

A plaintiff need not join as defendants all persons with inferior rights who may be interfering with his rights, and if the evidence shows that the defendant is so interfering, a decree enjoining him will be sustained notwithstanding there may be others equally guilty. (159) Who are to be made parties to a suit to restrain a ditch company from delivering water to subsequent purchasers of its capital stock is considered in the case of Downing v. Agricultural Ditch Co. (160)

§ 152. Injunction—Jurisdiction—Damages—Pleading.

An action may be brought by appropriators of water from a stream against persons, whether appropriators or not, who divert the water from the same stream above the plaintiffs, but within the boundaries of another state. (161) It is not infrequently the case that a diversion occurs in one county to the injury of plaintiff's land situate in another county. In such case the diversion and injury are held to be one act and to constitute but one cause of action, and the plaintiff may bring his action in either county as he may elect. (162) The same rule applies where the plaintiff's irrigating ditch is situated in two counties, and a diversion of the water is made above the head of the ditch. (163) Where several owners of water rights join as complainants for convenience only, in an action begun in a federal court to enjoin the obstruction of the stream or the diversion of water, the matter in dispute must exceed two thousand dollars, exclusive of interest and costs, as to each complainant, in order to give the court jurisdiction. (164) The plaintiff may in the one action recover damages for

(159) Buckers Irr. Co. v. Farmers' D. Co., 31 Colo. 62, 72 P. 49 ('03).

(160) 20 Colo. 546, 30 P. 336 ('95).

(161) Willey v. Decker, 11 Wyo. 32, 73 P. 210 ('03); Morris v. Bean [Mont.], 123 Fed 618 ('03), 146 *Id.* 423 ('06); Hoge v. Eaton [Colo.], 135 Fed. 411 ('05); see *ante*, §108.

(162) Deseret Irr. Co. v. McIntyre, 16 Utah 421, 52 P. 628 ('98).

(163) Lower King's River Water D. Co. v. King's River & Fresno Canal Co., 60 Cal. 408 ('82); see, also, Medano Ditch Co. v. Adams, 29 Colo. 315, 68 P. 431 ('02).

(164) Eaton v. Hoge [Colo.], 141 Fed. 64 ('05); see same case, 135 Fed. 411 ('05).

past injuries and secure the issuance of a restraining order preventing a continuance of the injury. (165) Where the plaintiff has an adequate remedy at law for the recovery of damages, an injunction will be denied. (166)

It is not necessary for the plaintiff in his bill for an injunction to set out his derivative title to the water claimed, the particular tract or tracts of land that have been irrigated by him or his grantors, the crops grown, the names of his grantors or predecessors in interest, nor the fact that the raising of crops on the land irrigated is successful; nor is he required to allege the particular point of diversion or the means or method used. It is sufficient for the bill to show the prior right of plaintiff to use the water upon certain lands described by section and township numbers, and the wrongful diversion of the water by the defendant. (167) In Texas it is necessary to plead that the stream is in the arid portion of the state where the rainfall is insufficient and irrigation is neces-

(165) Harris v. Shontz, 1 Mont. 212 ('70); Carrow v. Wood, 10 Mont. 500, 26 P. 388 ('91); Cruse v. McCauley [Mont.], 96 Fed. 369 ('99); Lisonbee v. Monroe Irr. Co., 18 Utah 343, 54 P. 1008 ('98); Thompson v. Madsen, 29 Utah 326, 81 P. 160 ('05); Clark v. Allaman, — Kan. —, 80 P. 571 ('05); Stoner v. Maw, 11 Wyo. 366, 73 P. 193 ('03), and other cases cited in this section; *contra*, Woolman v. Garringer, 1 Mont. 535 ('72).

(166) Plaintiff's crops injured by sand and gravel from defendant's mining operations, which filled his ditch—Atchison v. Peterson, 1 Mont. 561 ('72), 87 U. S. (20 Wall.) 507 ('74). Injunction and damages on account of diversion of springs—Leonard v. Shatzer, 11 Mont. 422, 28 P. 457 ('92). Diversion (allegation of irreparable injury not sufficient, facts must be shown)—Morris v. Bean [Mont.], 123 Fed. 618 ('03). To restrain construction of ditch through plaintiff's land—Hoye v. Sweetman, 19 Nev. 376, 12 P. 504 ('87). To restrain wrongful diversion—Jerrett v. Mahan, 20 Nev. 89, 17 P. 12 ('88). To restrain defendant from laying water pipe across plaintiff's land (no irreparable injury shown, remedy for damages at law)—Crescent Min. Co. v. Silver King Min. Co., 17 Utah 444, 54 P. 244 ('98). To restrain diversion—McCook Irr. & W. P. Co v. Crews, — Neb. —, 96 N. W. 996 ('03). To restrain diversion, injuries to plaintiff's mill (allegation insufficient)—Cline v. Stock, — Neb. —, 102 N. W. 265 ('05).

(167) Miller & Lux v. Rickey [Nev.], 127 Fed. 573 ('04); Anderson L. & S. Co. v. McConnell [Nev.], 133 Fed. 581 ('04); Farmers' Ind. Ditch Co. v. Agricultural Ditch Co., 22 Colo. 513, 45 P. 444 ('96); Cline v. Stock *et al.*, — Neb. —, 98 N. W. 454 ('04); see Jerrett v. Mahan, 20 Nev. 89, 17 P. 12 ('88); Raymond v. Minsette, 12 Mont. 551, 31 P 537 ('92).

sary for agricultural purposes, as the courts will not take judicial notice of the aridity of any portion of the state. (168) It is not necessary for a riparian proprietor to allege an appropriation by himself, nor that the defendant has not appropriated the water. The very nature of his ownership entitles him to the natural flow of the stream, subject to the reasonable use by other riparian proprietors above him, and he may maintain an action to prevent the wrongful diversion of the waters. If the defendant has a right by prior appropriation, it is a matter of defense to be set forth in the answer. (169) The right of the riparian proprietor does not depend upon actual present damages. It is sufficient to plead an obstruction of his right, and, such obstruction being shown, the law will infer damage. (170) The appropriation by the defendant and his right to the prior use of the water, as well as an abandonment or any acts of the plaintiff amounting to an estoppel, are matters of defense and should be specially pleaded. (171)

§ 153. Injunction—Violating—Suit on Bond.

Violations of the injunctive order are punished in the same manner as in other cases and are governed by the general rules of procedure relating to con-

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(168) McGhee Irr. D. Co. v. Hudson, 85 Tex. 587, 21 S. W. 175 ('93). Judicial notice was taken of aridity in Morris v. Bean, 146 Fed. 423, 429 (Mont., '06).

(169) United States Freehold Land & E. Co. v. Gallegos [Colo.] 89 Fed. 769 ('98).

(170) Rigney v. Tacoma L. & W. Co., 9 Wash. 576, 38 P. 147 ('94).

(171) United States Freehold Land & E. Co. v. Gallegos [Colo.], 89 Fed. 769 ('98); Hector Val. M. Co. v. Valley View M. Co., 28 Colo. 315, 64 P. 205 ('01); see, also, Lower Latham Ditch Co. v. Louden Irr. C. Co., 27 Colo. 267, 60 P. 629 ('00); Flannery v. Campbell, 30 Mont. 172, 75 P. 1109 ('04); Peregoy *et al.* v. Sellick, 79 Cal. 568, 21 P. 966 ('89). The case of Buckers Irr. Co. v Farmers' D. Co., 31 Colo. 62, 71 P. 49 ('03), regarding the right to intercept percolating water by supply ditches before it reaches the stream, contains a discussion as to parties, substitution of the successor of a water commissioner as an original party, submission of questions to a jury, findings of the trial court and decree. The case involved the right of defendant to intercept seepage and percolating waters that would otherwise flow into the natural channel and inure to the benefit of prior appropriators therefrom.

tempts. (172) Actions upon injunction bonds in water cases are governed by the same general rules as in other equitable actions, but where a reservoir, canal or irrigation company brings suit upon such a bond, it cannot include in its claim for damages those injuries which have incidentally fallen upon its stockholders, without proof that it had been compelled to respond for a breach of some valid contract into which it had antecedently entered, and which it was prevented from performing by the bond in suit, or that it had rightfully liquidated the claims asserted against it. (173)

§ 154. Mandamus.

The writ of mandamus is not peculiar to actions relating to the use of water. It is issued whenever the law imposes upon one the duty to do and perform any act. There must be a right in the plaintiff to demand the performance of the act and a duty imposed upon the defendant to perform the act. In addition, there must be no speedy and adequate remedy at law. Such is also the law when mandamus is used in connection with the distribution of water. Whenever the law imposes upon any public officer, canal or irrigation company the duty to do and perform certain acts relating to the distribution of water, the performance of the act will be compelled, at the instance of any person having the right to demand it, provided he has no speedy and adequate remedy at law. (174) Where an appropriator has the right to receive water from a canal, ditch company or carrier, or to have a certain quantity of water turned into his ditch or canal from the natural stream by a public officer, and the defendant in either case refuses to recognize the plaintiff's right, the remedy, by an action for damages, is neither speedy nor ade-

(172) *In re* North Bloomfield Gravel Min. Co. [Cal.], 27 Fed. 795 ('86); Elliot v. Whitmore, 10 Utah 246, 37 P. 461 ('94); Shore v. People, 26 Colo. 516, 59 P. 49 ('99).

(173) Eaton v. Larimer & Weld R. Co., 3 Colo App 365, 33 P. 815 ('93).

(174) The cases cited in this section generally support this statement.

quate. (175) As we have seen, (176) a consumer may acquire a right to receive and use water from the ditch or canal of a person or company engaged in carrying water for hire, by either contract or statute. (177) It makes no difference in an action for mandamus whether the plaintiff's right arises from a private contract or grows out of the statutory provisions. (178) The writ of mandamus will not lie to compel the state engineer or division superintendent to close the gates of certain ditches unless the rights of the petitioner have been ascertained and adjudicated. (179) Mandamus will lie to compel the trustees elected by an irrigation district to perform their duties under the law. (180)

The very nature of the rights to be protected by this writ shows that the relief must be immediate or it will not be effective. Therefore the proceedings to secure the writ are necessarily somewhat summary and trial courts should be liberal in matters of pleading and practice "lest the crops of the farmer burn while counsel contend over legal technicalities." (181) The case of Wheeler v. Northern Colorado Irrigation Co., (182) is a good illustration of the results following a denial or delay in the issuance of the writ in the lower court. In this case the writ was denied, and

(175) Golden Canal Co. v. Bright, 8 Colo. 144, 6 P. 142 ('84). In Washington it is held that where the right to water is based on a private contract, mandamus will not lie, as the remedy is at law on the contract. State v. Wash. Irr. Co., — Wash. —, 83 P. 308 ('06).

(176) *Ante*, §118.

(177) *Id.*

(178) Combs v. Agri. D. Co., 17 Colo. 146, 28 P. 968 ('92); People v. Farmers' H. L. C. & R. Co., 25 Colo. 202, 54 P. 626 ('98); Wilterding v. Green, 4 Ida. 773, 45 P. 134 ('96); Bardsly v. Boise City I. & L. Co., 8 Ida. 155, 67 P. 428 ('01). A petition for a writ of mandamus to compel a carrier to furnish the contract quantity of water, which fails to allege that the carrier has water in sufficient quantity not only to supply the plaintiff, but to supply all of the water takers, in compliance with the legal duty imposed upon it, is demurrable. Cozzens v. N. Fork Ditch Co., — Cal. —, 84 P. 342 ('06).

(179) Farmers' Ind. D. Co. v. Maxwell, 4 Colo. App. 477, 36 P. 556 ('94).

(180) Harris v. Tarbet, 19 Utah 328, 57 P. 33 ('99); see *ante*, §100, note 159.

(181) Townsend v. Fulton Irr. D. Co., 17 Colo. 142, 144, 29 P. 453 ('91).

(182) 10 Colo. 582, 17 P. 487 ('87).

on appeal the supreme court reversed the lower court and held that the writ should have issued. The demand in this action was for water to be furnished during the irrigating season of 1886, and the case was not decided upon appeal until 1887. It was of course impossible to command a delivery of water for 1886, and the supreme court held that to allow the writ to be amended so as to cover the approaching season of 1887 would be the substitution of a new and different cause of action. No reference was made to §314 of the Code of 1877, now §320, Mills' Ann. Code Colorado, providing that the court may have recourse to equity to make its judgment effective. In this case the consumer, although successful, still was defeated. Notwithstanding the worry and expense of litigation with a corporation of immense resources and capital, the plaintiff found that his victory was barren and useless, and that the defendant was no less defiant in 1887, after the supreme court had spoken, than in 1886 when the questions were new. If the law is to do justice, it must brush aside mere technicalities that are not substantial. To command or to deserve respect, its authority must be certain, adequate and effective. The code provision referred to above, if indeed any statutory enactment is necessary, ought to be sufficient to permit an injunctional order in aid of a judgment in mandamus, and to make the demand and performance good for each and every year so long as there is no new ground upon which the defendant can base a denial of the plaintiff's right. And in such a case the burden of showing that the ground is wholly new and apart from that already litigated should be upon the defendant. If it fails in such showing, its new refusal would be in contempt of the former order of the court. The water commissioner or master is bound by the decree fixing the date and extent of priorities to take water from the natural stream, and cannot be compelled to go back of the decree to ascertain or recognize any rights that have not been adjudicated and set forth in such decree. (183) In an action against such officer to pro-

(183) Stethem v. Skinner, — Ida. —, 82 P. 451, 452 ('05).

cure a peremptory writ of mandamus to compel him to distribute waters from a different stream than that named in the decree under which he is acting, all parties to be affected should be made parties to the action. (184) It was held by the Colorado court of appeals, (185) after discussing the decisions of the supreme court involving the issuance of the writ, that the writ of mandamus is not an appropriate remedy to secure a perpetual right to the use of water from a carrier for irrigation; that mandamus will not lie to enforce private rights resting on contract "unless the case be brought within the tolerably well settled rules respecting this extraordinary writ"; that the court will not interfere where it is apparent the interests of third persons, who are not before the court, are necessarily involved; citing on this last point Ditch Co. v. Maxwell, (186) and Bright v. Ditch Co. (187) However, the court did not disapprove the decisions of the Colorado supreme court cited elsewhere in this section. It was held in Townsend v. Fulton Irr. D. Co., (188) that an allegation which alleges a perpetual right to the use of water through the ditch or canal of a carrier is properly treated as surplusage. It would seem, however, that in line with the views expressed above in this section, such an allegation might be made material, and relief granted that would extend beyond the one irrigating season, unless new conditions should arise warranting a change in the decree. (189) Two attempts have been made in Colorado to control the district judge and the referee appointed to take the testimony in a proceeding to adjudicate the right to take water from the natural stream, but in each instance the supreme court refused to issue the writ of mandamus. (190)

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(184) Stethem v. Skinner, — Ida. —, 82 P. 451 ('05).
(185) Farmers' High Line C. & R. Co. v. People, 8 Colo. App. 246, 45 P. 543 ('96).
(186) 4 Colo. App. 477, 36 P. 556 ('94).
(187) 3 Colo. App. 170, 32 P. 433 ('93).
(188) 17 Colo. 142, 29 P. 453 ('91).
(189) See *post*, §155, Mandatory Injunction.
(190) Sterling Irr. Co. v. Dormer, 19 Colo. 595, 36 P. 787 ('94); Union Colony v. Elliott, 5 Colo. 373 ('80).

In cases brought against a carrier of water to compel the delivery, through its ditch, of the quantity of water to which the plaintiff is entitled, the remedy by mandamus, as mentioned above, is not effective in many instances; because, as is generally known, if the consumer does not receive a supply of water early in the irrigating season, with which to start his various crops, a supply later in the season will be of little or no avail. The irrigating season is short, and the general practice of the defendant in such cases is to delay the hearing as long as possible, with the result that when the writ is finally issued it is too late to be of any substantial benefit. It may be said, of course, that the rights of the parties are to be settled by the proceeding that there may be no repetition of the trouble in the ensuing year. But few farmers can afford to lose the crops of a whole year in addition to the worry and expense of protracted litigation. Occasionally, too, some individuals and frequently some corporations, through their officers, litigiously, if not maliciously, assert their stale and fictitious positions year after year, and thus compel the consumer, annually, to make the same fight. This is well illustrated by the case of Pouppirt *et al.* v. Northern Colorado Irrigation Co. (191) There the plaintiffs were forced for three consecutive years to apply for a writ of mandamus to compel the defendant to deliver them water at the rate fixed by the board of county commissioners. Each year, except the last, the case was delayed by one device or another until too late for the plaintiffs to be substantially benefited by the writ. In the spring of 1906, the last of the three years referred to, the same condition of facts existed as in the two previous years. The plaintiffs then filed a complaint identical as to parties and statement of cause of action with that filed and passed upon in the two previous years, but in addition pleaded former recovery or *res adjudicata*, in that the parties and issues in the suits of the previous years were the same, and that all the questions involved had theretofore

(191) In the district court of the 13th judicial district of Colorado for the county of Adams.

been passed upon and adjudicated, and that the previous judgments were in full force and effect. The trial court overruled all motions and demurrers, without argument, as fast as they were filed, and then ordered the defendant to answer forthwith, which was accordingly done. Upon the filing of the answer the court treated the matters therein as *res adjudicata* and issued a peremptory writ of mandamus *instanter*. The proceedings here referred to were all had and taken in a single day. The court seemed to realize that the plaintiffs deserved some consideration for the delays and useless results of the prior years. But had there been any change of parties or issues, how then would the plaintiffs have fared as to speedy and effective procedure? This thought brings us back to the words above in reference to the Wheeler case, and again we ask, Why should mandamus be so ineffectually handled as a remedy between carrier and consumer that the latter should annually be driven to the trouble and expense of harrassing litigation to protect his rights? We have now reached a period in the development of irrigation when water rights have a peculiar value and relation to the development of the whole country. In view of this fact so efficient a remedy as mandamus usually is should be a controlling reason why the courts should be alert to see that it and all other remedies, without any unnecessary technicalities or refinements, are put to their highest service in all matters pertaining to irrigation.

§ 155. Mandatory Injunction.

The writ of mandamus being merely a command to do or perform the particular thing prayed in the petition, does not afford any permanent relief and frequently is issued too late to be of any material benefit. (192) It would seem, therefore, that the most efficient remedy in cases where the defendant's duty to perform the service and the plaintiff's right to demand such performance are reciprocal rights and duties arising with each recurring irrigation season, is the perpetual mandatory injunction. It is true

(192) *Ante*, §154.

that courts very rarely issue the perpetual mandatory injunction, and still more rarely issue preliminary writs of this character. They have been granted more freely by the English courts than by the American, and it has been said in some American decisions that an interlocutory mandatory injunction would never be granted. This doctrine is not only opposed to the overwhelming weight of authority but it is contrary to the principle which regulates the administration of preventive relief, and is "manifestly absurd." (193) The question of the issuance of mandatory injunctions has been before the supreme court of Colorado several times, but in each instance the denial of the writ was upon jurisdictional grounds or defects in the pleadings. In the case of the Fulton Ditch Co. v. Twombly (194), the court said:

"The interlocutory writ of injunction was issued *ex parte*, and was mandatory. We do not find it necessary to determine whether a mandatory writ could have been legally allowed without notice on the allegations of the complaint when there is no statute warranting it. The authority to grant it in any case is very doubtful, and the authorities are almost universally against it. It is in its nature a decretal order, and although under certain circumstances allowed as interlocutory, it is generally not allowable until the rights of the parties have been fully determined upon final hearing."

In the case of People v. District Court, (195) the court said:

"It is altogether clear that the district court was also entirely without jurisdiction to issue the temporary mandatory injunction, because no notice to the defendant was given."

In order to bring himself within the equity rule the petition should show that plaintiff would suffer irreparable injury and had no speedy and adequate

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(193) 3 Pom. Eq. Jur., §1359 and note. See, also, Bisp. Eq., §400.
(194) 6 Colo. App. 554, 42 P. 253 ('95).
(195) 29 Colo. 279, 68 P. 224 ('02).

remedy at law. (196) Speaking of "irreparable injury," the Colorado court of appeals said:

"The rigid, narrow and unpliant construction of the word 'irreparable' which formerly prevailed, has long since given way, even where no statute expressly requires it, to an enlarged and more liberal interpretation in accord with the more advanced requirements of the times, with the more enlightened spirit of the age, and with the increased necessities of trade and commerce." (196*a*)

In a case where merchants had entered into a mutual agreement to close their stores at certain hours and one violated the agreement, a mandatory injunction issued compelling him to close, and the appellate court said:

"We think that in this case injunction is a proper remedy. The recurring breach each day of the contract would require numerous actions at law, and by different plaintiffs as well, or if not, there would be at least a continuing damage by the breaches and violation of the contract. It has repeatedly, if not universally, been held that injunction is proper in either of these classes of cases to prevent a multiplicity of suits or a repeated and recurring cause of action. (197) From these and many other cases of similar import, (198) it would seem that in instances similar to the Pouppirt case, (199) where the breach or refusal was one of annual occurrence, and the damages were suffered by many individuals each having a separate cause of action which was inadequate and could not compensate for the full loss, that the "irreparable injury" would be apparent from the face of

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(196) Fulton D. Co. v. Twombly, 6 Colo. App. 554, 42 P. 253 ('95).

(196*a*) Schradsky v. Appel Clothing Co., 10 Colo. App. 195, 50 P. 258 ('97).

(197) Stovall v. McCutchen, 107 Ky. 577, 54 S. W. 969 ('00).

(198) Cole Silver M. Co. v. Virginia & G. H. Water Co., 1 Sawy. 685, Fed. cases, §2990 ('71); Toledo A. H. & N. M. Ry. Co. v. Penna. Co., 54 Fed. 746 ('93); Pokegama S. P. L. Co. v. K. R. L. & I. Co., 86 Fed. 529 ('98); Whitman v. Fayette F. G. Co., 139 Pa. 492, 20 Atl. 1062 ('91); Denver & N. O. R. Co. v. Atchison, T. & S. F. R. Co., 13 Fed. 549 ('82).

(199) See *supra*, §154.

the pleadings, and the prevention of a multiplicity of suits and recurring causes of action would but strengthen the plaintiff's position. By this proceeding, too, the rights of the parties would be determined and established for all time; but, as in all other cases of injunction where the situation is materially changed, it would be modified or dissolved. The proceeding by mandamus, as at present administered, (200) adjudicates the rights of the parties for a particular season only, and each year is a new, separate and distinct cause of action. (201) In a recent case decided by the supreme court of Arizona, (202) a temporary mandatory injunction was issued pending final judgment, requiring the defendant company to deliver water to Nelssen for use upon his ranch at such price as should be fixed by the court, and a price was fixed by the court and paid to the company by the plaintiff, Nelssen. The supreme court, in passing upon this point, on appeal, said:

"If the granting of this order (the mandatory injunction) was an erroneous exercise of power, the error would not be ground for reversing or modifying the final judgment, upon the rendition of which the interlocutory order expired by its own limitation. Therefore we need not pass upon the point."

§ 156. Mandamus—Appeals.

Whether or not an appeal lies from the judgment of the trial court in an action of mandamus has not been specifically determined. In the cases of Combs v. Agricultural Ditch Company, (203) and Townsend v. Fulton Irr. Ditch Co., (204) being appeals in mandamus suits to compel the delivery of water, no argument was had upon the question of the right to appeal, and the court expressly says that on that point the cases are not to be taken as precedents. In Combs

(200) See *supra*, §154.
(201) Wheeler v. Northern Colo. Irr. Co., 10 Colo. 582, 17 P. 487 ('87); see, also, *supra*, §154.
(202) Salt River Val. C. Co. v. Nelssen, — Ariz. —, 85 P. 117 ('06).
(203) 17 Colo. 146, 28 P. 966 ('92).
(204) 17 Colo. 143, 29 P. 453 ('92).

v. Agricultural Ditch Co., (205) Elliott, J., in delivering the opinion of the court, says:

"In the case of Wheeler v. Northern Colo. Irr. Co., 10 Colo. 582, a judgment denying the writ was reviewed *upon appeal* by this court and reversed. In the latter case, however, the appeal was prosecuted under the special appeal acts of 1885, Session Laws, p. 350. Whether judgments in cases of this kind are appealable under the code of 1887, may, in some cases, be a matter of much practical importance. Upon reaching this cause for consideration we suggested a hearing, *in limine*, upon the question of appeal; but counsel for appellee did not present any brief or argument upon the point. Under the circumstances we have concluded to consider the case as though it related to a franchise—Code, section 388. The decision, however, is not to be taken as a precedent upon that question. There may be good reasons why appeals in cases of this kind should not be allowed which could not be urged against a review by writ of error."

§ 157. Damages for Negligence—Breach of Contract—Growing Crops—Measure of Damage.

The owners of canals, ditches, reservoirs, dams and embankments, used in storing or conveying water or in the construction of railroads across watercourses or dry channels, have the duty imposed upon them of so constructing, using and maintaining their property as to cause no injury to others. There is no liability for damages resulting from the existence of a ditch, canal or reservoir, *ipso facto*, (206) but the owner is required to use such care in the construction of the canal, ditch or reservoir, as a man of average prudence and intelligence would employ under like circumstances to protect his property. (207) He is liable for all damages that may result from the over-

(205) 17 Colo. 146, 148, 28 P. 966 ('92).

(206) Platte & Denver D. Co. v. Anderson, 8 Colo. 131, 6 P. 515 ('84); City of Denver v. Mullin, 7 Colo. 345, 3 P. 693 ('84); Walley v. Platte & Denver D. Co., 15 Colo. 579, 26 P. 129 ('90).

(207) City of Boulder v. Fowler, 11 Colo. 396, 18 P. 337 ('88); Catlin L. & C. Co. v. Best, 2 Colo. App. 481, 31 P. 391 ('92); Con-

flowing of the ditch. This liability arises from the improper, careless or negligent manner of operation. (208) The ditch or reservoir owner is liable for the damages caused by water percolating or seeping from his works and injuring the property of adjoining landowners. (209) Damages resulting from the pollution of the stream will be awarded against the guilty party. (210) One who wrongfully diverts the water and prevents it from flowing into the diverting works or reaching the place of use of another, when that other is lawfully entitled to its use, is also liable for the damages caused by such wrongful diversion. (211) One who by contract assumes the duty of furnishing water to a consumer, or by operation of law has that duty imposed upon him, is liable for damages caused by his failure to furnish such water, and he is not excused from liability by a scarcity of water in the stream from which the supply is taken, if by the diligent employment of proper measures to utilize the water that was in the stream, the injury might have been averted. He can only be relieved from liability on proof of circumstances clearly showing that the

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solidated H. S. D. & R. Co. v. Hamlin, 6 Colo. App. 341, 40 P. 582 ('95); Old v. Keener, 22 Colo. 6, 43 P. 127 ('95); Hughes v. City of Austin, 12 Tex. Civ. App. 178, 33 S. W. 607 ('95); Kearney C. & W. S. Co. v. Akeyson, 45 Neb. 635, 63 N. W. 921 ('95); Arave v. Ida. Canal Co., 5 Ida. 68, 46 P. 1024 ('96).

(208) Platte & Denver D. Co. v. Anderson, 8 Colo. 131, 6 P. 515 ('84); Denver City Irr. & W. Co. v. Middaugh, 12 Colo. 434, 21 P. 565 ('89); Greeley Irr. Co. v. House, 14 Colo. 549, 24 P. 329 ('90); King v. Miles City Irr. D. Co., 16 Mont. 463, 41 P. 431 ('95).

(209) Sylvester v. Jerome, 19 Colo. 128, 34 P. 760 ('93); Consolidated H. S. D. & R. Co. v. Hamlin, 6 Colo. App. 341, 40 P. 582 ('95); Jenkins v. Hooper Irr. Co., 13 Utah 100, 44 P. 829 ('96); Shields v. Ore. Ex. D. Co., 23 Nev. 349, 47 P. 194 ('97); Stuart v. Noble D. Co., 9 Ida. 765, 76 P. 255 ('04).

(210) Montana Co., Ltd., v. Gehring [Mont.], 75 Fed. 384 ('96); Watson v. Colusa-Parrott M. & S. Co., 31 Mont. 513, 79 P. 16 ('05); City of San Antonio v. Rivas, — Tex. —, 57 S. W. 855 ('00); Umschied v City, — Tex. —, 69 S. W. 496 ('02); Hill v. Standard Min. Co., — Ida. —, 85 P. 907 ('06). When the complaint states fully and concisely the nature of the damage, amount, and that it was caused by the unlawful, wrongful and negligent acts of the defendant, it states a cause of action—Hill v. Standard Min. Co., — Ida. —, 85 P. 907 ('06).

(211) Brown v. Ashley, 13 Nev. 251 ('78); Gotelli v. Cardelli, — Nev. —, 69 P. 8 ('02); Cash v. Thornton, 3 Colo. App. 475, 34 P. 268 ('93); Shotwell v. Dodge, 19 Wash. 576, 36 P. 254 ('94).

failure to perform was chargeable to *vis major*, and not to negligence and inattention. (212) One of the principal questions in actions of the character last referred to, is the measure of damages. Usually the principal injury is to the growing crops, and the general rule is, the value of the crops that would have been produced when harvested, but for defendant's negligence, less the expense that would have been incurred in planting, raising, harvesting, and marketing. (213) If the crops are only partially destroyed, the measure of damages is their value immediately before and after the injury, to be ascertained by the general rule just given. (214) In computing the damages to land the value immediately before and after the injury is the basis, and the difference is the damage. (215) In a Colorado case, (216) damages were given to the owner of virgin land, that he had agreed to lease for farming and gardening purposes, for the refusal of the ditch company to furnish water

(212) Pawnee L. & C. Co. v. Jenkins, 1 Colo. App. 425, 29 P. 381 ('92); Northern Colo. Irr. Co. v. Richards, 22 Colo. 450, 45 P. 423 ('96); Knowles v. Leggett, 7 Colo. App. 265, 43 P. 154 ('96); Consolidated C. Co. v. Peters, 5 Ariz. 80, 46 P. 74 ('96); Raywood Rice C. & M. Co. v. Wells, 32 Tex. Civ. App. 401, 77 S. W. 253 ('03); Colo. Canal Co. v. McFarland & Southwell, — Tex. —, 94 S. W. 400 ('06).

(213) Shotwell v. Dodge, 9 Wash. 576, 36 P. 254 ('94); Gulf C. & S. T. Ry. Co. v. Nicholson, — Tex. Civ. —, 25 S. W. 54 ('94); Raywood Rice C. & M. Co. v. Wells, 32 Tex. Civ. App. 401, 77 S. W. 253 ('03); Barstow Irr. Co. v. Cleghorn, — Tex. Civ. App. —, 93 S. W. 1023 ('06); Colo. Canal Co. v. Sims, — Tex. Civ. App. —, 94 S. W. 365 ('06); Knowles v. Leggett, 7 Colo. App. 265, 43 P. 154 ('96); Chicago B. & Q. R. Co. v. Emmert, 53 Neb. 237, 73 N. W. 540 ('97). There is a fatal variance between a complaint which alleges damages for destruction of growing crops because of the failure of a defendant water company to furnish the plaintiff with water for irrigation, and evidence which goes to prove that the acts complained of resulted in the depreciation of the market value of the land—Equitable Sec. Co. v. Montrose & Delta Canal Co., 20 Colo. App. 465, 471, 79 P. 747 ('05).

(214) Gulf C. & S. T. Ry. Co. v. Nicholson, — Tex. Civ. —, 25 S. W. 54 ('94).

(215) Missouri K. & T. Ry. Co. of Tex. v. Graham, 12 Tex. Civ. App. 54, 33 S. W. 576 ('95); San Antonio v. Horkan, 45 S. W. 391 ('98); Houston & T. C. Ry. Co. v. Lensing, — Tex. —, 75 S. W. 826 ('03); Texas C. R. v. Brown, — Tex. —, 86 S. W. 659 ('05); Watson v. Colusa-Parrott M. & S. Co., — Mont. —, 79 P. 16 ('05).

(216) Northern Colo. Irr. Co. v. Richards, 22 Colo. 450, 45 P. 423 ('96).

without the payment of a royalty as a condition precedent, thus preventing the land from being broken and cropped. The rule laid down in this case as the measure of damages was such rental value of the land as the owner would have received in crops, less any outlay for improvements or preparing the land for cultivation.

The "act of God" as a defense must be specially pleaded; (217) and the plaintiff may be guilty of contributory negligence in not averting the damage if it is reasonably possible for him to do so, by obtaining water from some other source to irrigate and save his crops. (218) A contract releasing a ditch, canal or reservoir proprietor from damages by reason of unavoidable accidents and breaks of his works, will not release a liability for damages, the result of gross and continued negligence. (219) Where the defendant defaulted under the practice, prior to the adoption of the Code of Civil Procedure, the damages were ascertained and assessed by a jury. (220)

§ 158. Ejectment—Quieting Title—Partition.

The right to the use of water being real estate, an action can be maintained to quiet the title thereto the same as is the case with other classes of real property. Such an adjudication proceeding, because of its results, is the most common method of adjusting the title of all appropriators in a single proceeding. (221) Being real estate, the water right (222) passes to the heirs of a decedent, and an action to quiet title cannot be maintained by an administrator; but he may sue for rents due the estate for the use of such water right. (223) A court of equity, having once

(217) Chicago R. I. & P. Ry. Co. v. Shaw, 63 Neb. 380, 88 N. W. 508 ('01).
(218) Mack v. Jackson, 9 Colo. 536, 13 P. 542 ('86); Shields v. Ore. Ex. D. Co., 23 Nev. 349, 47 P. 194 ('97).
(219) Catlin L. & C. Co. v. Best, 2 Colo. App. 481, 31 P. 391 ('92).
(220) Jones v. Stevens, 1 Colo. 67 ('67).
(221) Frost v. Alturas W. Co. — Ida. —, 81 P. 996 ('05).
(222) *Ante*, §129.
(223) Travelers' Ins. Co. v. Childs, 25 Colo. 360, 54 P. 1020 ('98). For pleading in action to quiet title, see Miller *et al.* v. Lake Irr. Co., 27 Wash. 447, 67 P. 996 ('02); Brothers v. Brothers, 29 Colo. 69, 66 P. 901 ('01).

acquired jurisdiction in an action to restrain interference with a water right, may properly retain jurisdiction, and in the same proceeding and independent of statute may determine all the rights of the parties and enter a decree quieting plaintiff's title to the water in controversy, although plaintiff is not in actual possession of the water.(224) By statute in Colorado (225) it is provided that under certain conditions an information in the nature of *quo warranto* may be brought to procure the forfeiture of the corporate franchise of any corporation engaged in conveying water from the stream to the consumer.(226) A ditch, canal or reservoir, being a corporeal hereditament,(227) an action of ejectment will lie to recover the possession of the same.(228) An action to partition the waters of a stream will not lie, for the reason that the title to the water in the stream does not vest in the appropriator, but merely the right to divert and use water from the stream.(229)

(224) Gutheil Park Inv. Co. v. Montclair, 32 Colo. 420, 76 P. 1050 ('04).
(225) 1 Mills' Ann. Stat., §2307; *post*, §513.
(226) Larimer Co. R. Co. v. People, 8 Colo. 614, 9 P. 794 ('85).
(227) *Ante*, §129.
(228) Integral Quicksilver M. Co. v. Altoona Quicksilver M. Co. [Cal.], 75 Fed. 380 ('86).
(229) Crippen Tr. v. White, 28 Colo. 298, 64 P. 184 ('01).

PART VIII.

EMINENT DOMAIN.

CHAPTER 29.

RIGHTS OF WAY FOR CANALS AND DITCHES.

§ 159. By Agreement—Prescription—Necessity—Statute.

The recognition of the right to divert the water of the streams and convey it to non-riparian lands, frequently a great distance from the source of supply, would have been of very little value had not the federal and state governments applied the "law of necessity" to another class of property and enabled the appropriator to secure the necessary right of way for his canal or ditch. Such a right of way could have been obtained perhaps, in most cases, by purchase from or contract with the landowner, but without the right to condemn there was no remedy for the appropriator who met with an obstinate proprietor who would neither give, take nor sell. A right of way could have been secured also by adverse user for the requisite prescriptive period. (1) But the occupation of the land with the ditch or canal must be adverse, continuous, uninterrupted and not by the acquiescence of the owner of the land. If its inception is permissive or under a license from the owner, it cannot avail to work an ouster. (2) These methods, however, would not protect the appropriator in all instances, as each was dependent upon the will of the landowner. Out of this situation grew, first, the custom acquiesced in by the federal government, and then enforced by constitutional and statutory pro-

(1) Coventon v. Seufert, 23 Ore. 548, 32 P. 508 ('93); Miller v. Douglas, 7 Ariz. 41, 60 P. 722 ('00).

(2) Curtis v. La Grande W. Co., 20 Ore. 34, 23 P. 808 ('90); Yeager v. Woodruff, 17 Utah 361, 53 P. 1045 ('98); Bowman v. Bowman, 35 Ore. 279, 57 P. 546 ('99).

visions, enabling the appropriator to condemn a right of way for his ditch, canal or reservoir upon the payment of a just compensation. (3) The statutory provisions of the several states have been passed upon by the courts and their constitutionality sustained, and the taking is held to be for a public purpose. (4)

§ 160. Federal Legislation Granting Right of Way.

The first statutory recognition by the United States of the necessity for a right of way for ditches and canals was by the act of congress July 26th, 1866. (5) and the amendment of July 9th, 1870. (6) These acts recognized all those rights that had been acquired prior thereto, and provided for the acquirement of similar rights in the future. In 1871 the supreme court of Montana (7) said:

"It was the intention of congress to give the owners of water rights the right of way over the public domain for the construction of ditches to make the water available for use." (8)

(3) Const. and stats., *post*, Part X.

(4) Shilling v. Rominger, 4 Colo. 100 ('78); Coffin v. Left-Hand Ditch Co., 6 Colo. 443 ('82); Golden Canal Co. v. Bright, 8 Colo. 144, 6 P. 142 ('84); Tripp v. Overocker, 7 Colo. 72, 1 P. 695 ('83); Downing v. Moore, 12 Colo. 316, 20 P. 766 ('88); Gibson v. Cann, 28 Colo. 499, 66 P. 879 ('01); Oury v. Goodwin, 3 Ariz. 255, 26 P. 376 ('91); Lux v. Haggin, 69 Cal. 255, 10 P. 674 ('86); Lindsay Irr. Co. v Mehrtens, 97 Cal. 676, 32 P. 802 ('93); Ellinghouse v. Taylor, 19 Mont. 462, 48 P. 757 ('97); Umatilla Irr. Co. v. Barnhart, 22 Ore. 389, 30 P. 37 ('92); McPhee v. Kelsey, 44 Ore. 193, 74 P. 401 ('03); Prescott Irr. Co. v. Flathers, 20 Wash. 454, 55 P. 635 ('99); Paxton Irr. Canal Co. v. Farmers' Irr. Co., 45 Neb. 884, 64 N. W. 343 ('95); Alfalfa Irr. Dist. v. Collins, 46 Neb. 411, 64 N. W. 1086 ('95); Albuquerque L. & I. Co., v. Guiterrez, 10 N. M. 177, 61 P. 351 ('00); McGhee Irr. Ditch Co. v. Hudson, 85 Tex. 587, 22 S. W. 398 ('93); Toyaho Cr. Irr. Co. v. Hutchins, 21 Tex. Civ. App. 274, 52 S. W. 101 ('99); Borden v. Trespalacios R. & I. Co., — Tex. Civ. App. —, 82 S. W. 461 ('04); same case, 98 Tex. 494, 86 S. W. 11 ('05); Nash v. Clark, 27 Utah 158, 75 P. 371 ('04); see, also, 1 Am. & Eng. Ann. Cases 300, note 304.

(5) Rev. Stat., §2339, *post*, §168; *ante*, §12.

(6) Rev. Stat., §2340, *post*, §169; *ante*, §12.

(7) Noteware v. Stevens, 1 Mont. 311 ('71).

(8) For cases discussing this act, see *ante*, §13. Tynon v. Despain, 22 Colo. 240, 43 P. 1039 ('96); Nippel v. Forker, 26 Colo. 74, 56 P. 577 ('99); Shoemaker v. Hatch, 13 Nev. 261 ('78); Bybee v. Oregon & C. R. Co., 11 Sup. Ct. 641, 139 U. S. 663 ('91); Ada Co. Farmers' Irr. Co. v. Farmers' C. Co., 5 Ida. 793, 51 P. 990 ('98); Childs v. Sharia, 8 Ida. 378, 69 P. 111 ('02); Miller v. Douglas, 7 Ariz. 41, 60 P. 722 ('00).

By the act of 1866, (9) it is provided that whenever any person shall, in the construction of any ditch or canal, injure or damage the possession of any settler on the public domain, the party doing such damage shall be liable to the party injured. An appropriator cannot, as against a subsequent settler, enter upon the land in his possession for the purpose of changing his point of diversion or the line of his ditch without the settler's consent. (10) While a person in possession of public land who has not filed, but has made improvements thereon, cannot claim any compensation for land taken or injured by the construction of a canal or ditch by another, still he may claim compensation for the damage done to his improvements. (11) By the act of March 3, 1891, (12) a right upon and way through public lands and reservations is granted for reservoir sites and rights of way for canals or ditches upon filing certain proofs of the organization of the ditch company and maps of the canal. No rights under this act can be claimed in respect to land to which private rights have attached. It only applies to unoccupied public land. (13)

§ 161. Right of Way for Ditches under State Statutes —Statute of Frauds.

The several states and territories recognizing the necessities of the intending appropriator, by constitutional and statutory provisions, declared that he should have a right of way from the stream, across the intervening lands of others, to the place of intended use. Anticipating that it would not in all cases be possible to obtain this advantage or necessity by contract or deed, these constitutions or statutes conferred upon the appropriator the power to condemn. and provided the method by which it should be done. This right to conduct water over the lands

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(9) Rev. Stat., §2339, *post*, §168.
(10) McGuire v. Brown, 106 Cal. 660, 39 P. 1060 ('95).
(11) Knoth v. Barclay, 8 Colo. 300, 6 P. 924 ('85); Colo. Consol. L. & W. Co. v. Morris, 1 Colo. App. 401, 29 P. 302 ('92).
(12) 26 Stat., p. 1101, §§18-21, *post*, §174a-174d.
(13) Nippel v. Forker, 26 Colo. 74, 56 P. 577 ('99).

of another is an interest in real estate, (14) and the first serious question presented to the courts was, whether or not the acquirement of this right by grant or contract came within the statute of frauds and should therefore be in writing. (15) The Colorado court in this case (16) applied the law of necessity, and held that the right of way across lands, granted by parol, upon which the party had acted and built his canal or ditch, could not be revoked or canceled. One of the justices based his decision on the statute relating to appropriation of water, another on the ground of necessity, and the third on the ground of estoppel *in pais*. (17)

The statutes do not of themselves grant the right of way nor confer the power of entering upon the lands of another until the right is ascertained and established by a proper proceeding in eminent domain. (20) Upon the right to take land for ditches certain limitations were placed for the protection of the landowner. In Colorado it is enacted that no tract of improved or occupied land shall have upon

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(14) Yunker v. Nichols, 1 Colo. 551 ('72); Shilling v. Rominger, 4 Colo. 105 ('78).

(15) Yunker v. Nichols, 1 Colo. 551 ('72).

(16) Discussed more fully, *ante*, §22.

(17) See, also, Scott v. Toomey, — So. Dak. —, 67 N. W. 838 ('96); Miller v. Douglas, 7 Ariz. 41, 60 P. 722 ('00). The Yunker's case omits to say anything about compensation for land taken for the right of way for a ditch,(18) and the supreme court in the case of Stewart v. Stevens,(19) held that since that case was decided, a constitution had been formed, which prohibited the taking of private property without compensation, that the Colorado legislature had provided the proceedings by which, upon the payment of just compensation, private property could be taken. The court also held in the Stewart-Stevens case that grants of estates and easements in land are, by the statute of frauds, to be evidenced by properly executed and authenticated written instruments, and, except in cases of fraud on the part of the landowner, are not to be otherwise created, and that the damage to support an estoppel against the owner of an estate and convert him into a trustee must be something more substantial than that which would technically amount to a consideration in a contract. See, also, Tripp v. Overocker, 7 Colo. 72, 1 P. 695.

(18) Yunker v. Nichols, 1 Colo. 551 ('72); *ante*, §22.

(19) 10 Colo. 440, 445, 15 P. 786 ('87).

(20) Emerson v. Eldorado D. Co., 18 Mont. 247, 44 P. 969 ('96); Toyaho Cr. Irr. Co. v. Hutchins, 21 Tex. Civ. App. 274, 52 S. W. 101 ('99).

it more than one ditch or canal, for the conveyance of water to other lands, without the written consent of the owner, provided all the water necessary to be carried across or through such tract can be carried through one ditch and that the ditch or canal shall traverse the shortest possible route. (21) This statutory enactment does not conflict with the constitutional provisions granting a right of way for ditches and reservoirs, but merely regulates the exercise of the right, so as to inflict the least inconvenience and injury possible upon the owner of the servient estate. (22) This act has been held to apply only to the protection of private landowners, (23) while in Nebraska a similar act, but broader in its terms, was held to protect the property of corporations as well as of individuals. (24) The effect of the two sections of this Colorado act just commented on (25) is extended by its third section, (26) which provides that a subsequent appropriator may enlarge and use the ditch of a prior appropriator to convey the water appropriated by the former upon payment to the latter of "a reasonable proportion of the cost of construction of said ditch." The purpose of this section was to avoid a multiplicity of canals and ditches. (27) Under this section ditches may be enlarged but they continue as private ditches and the enlargement cannot be made by a city even for a purely public purpose. (28) This section has been held unconstitutional insofar as it undertakes to limit or direct the compensation to be paid for the property by such a phrase as "a reasonable proportion of the cost of

(21) 1 Mills' Ann. Stat., §§2261-2262, *post*, §§406-407.
(22) Tripp v. Overocker, 7 Colo. 72, 1 P. 695 ('83).
(23) San Luis Land, Canal & Irr. Co. v. Kenilworth Canal Co., 3 Colo. App. 244, 32 P. 860 ('93).
(24) Paxton v. Hershey Irr. C. & L. Co. v. Farmers' Co., 45 Neb. 884, 64 N. W. 343 ('95).
(25) 1 Mills' Ann. Stat., §§2261-2262, *post*, §§406-407.
(26) 1 Mills' Ann. Stat. §2263, *post*, §408.
(27) For proceedings under the statutes as well as the manner in which they are applied, see Sand Cr. Lateral Irr. Co. v. Davis, 17 Colo. 326, 29 P. 742 ('92); Downing v. Moore, 12 Colo. 316, 20 P. 766 ('88).
(28) Junction Cr. & N. Durango Domestic & Irr. D. Co. v. City of Durango, 21 Colo. 194, 40 P. 356 ('95).

construction." (29) But in other respects it is valid. The owner of the ditch or canal to be enlarged cannot be compelled to bear any of the cost or expense of the enlargement, (30) but after the enlargement is completed the duty of keeping the ditch or canal in repair is upon both sets of owners, the old and the new, and the expense is to be equitably adjusted. (31) The right to construct a ditch across the land of another does not include the right to subsequently enlarge the ditch, and any enlargement without the consent of the owner will make the party constructing it liable in damages. (32) In all proceedings under the eminent domain act, the question of the necessity or, when the proceedings are to condemn a right of way for a ditch, the question of the feasibility and practicability of the undertaking must be tried, if at all, by a board of commissioners appointed by the court. (33)

§ 162. Eminent Domain as to Riparian Rights, Mines, Municipalities and Power.

As we have seen, (34) in those states and territories where the courts have adhered to the common-law doctrine of riparian rights, as well as undertaken to recognize the newer doctrine of appropriation, an appropriation of water cannot be made from any stream wherein, by prior settlement, riparian rights have vested. That is to say, an appropriation, (35) meaning a taking and applying of water to one's own use, cannot be made without paying a compensation therefor.(36) In such jurisdictions the rights of the

(29) Tripp v. Overocker, 7 Colo. 72, 1 P. 695 ('83). The court said in this case, that the right to enlarge and use the ditch of another, already constructed, will be enforced in the same manner, and under the same law, as the right to take or damage any other kind of private property.

(30) Sand Cr. Lateral Irr. Co. v. Davis, 17 Colo. 326, 29 P. 742 ('92).

(31) Patterson v. Brown & Campion Ditch Co., 3 Colo. App. 511, 34 P. 769 ('93).

(32) Clear Cr. Land & Ditch Co. v. Kilkenny, 5 Wyo. 38, 36 P. 819 ('94).

(33) Sand Cr. Lateral Irr. Co. v. Davis, 17 Colo. 326, 29 P. 742 ('92).

(34) *Ante*, § 20.

(35) *Ante*, § 39.

(36) See cases cited, *ante*, §20.

riparian owner are property rights. The beneficial use of water, however, particularly for agricultural purposes, has been recognized in such states as a public use, (37) as also has been the taking for a public water supply. (38) It is provided by statute and held by the courts, therefore, that the rights of riparian owners in the waters of a stream may be condemned, and upon the payment of a just compensation therefor they may be taken for agricultural or public uses. (39) It would seem, however, that in instances where the stream system is of considerable size and the number of riparian owners who will be affected by a diversion of water is large, the proceeding to condemn their respective rights and compensate each for his injury or loss of the flow of the stream would be of such magnitude and so expensive as to practically bar the appropriator from attempting it. It should be noted that mining which, in the early days of California, was the paramount industry of that state, and which at one time was thought to have a better right than agriculture to the waters of the state, (40) has dropped from its position of supremacy and now the use of water for that purpose is held not to be a public use, and the statute authorizing the taking of water to run a group of mines is held to be unconstitutional. (41) In Colorado it is provided that municipalities may appropriate water for a public water supply, and may buy or condemn prior vested rights thereto, but in no case can they take water belonging to a prior appropriator, except by his consent, without compensating him therefor. (42) It

(37) Lux v. Haggin, 69 Cal. 255, 10 P. 674 ('86); Aliso, etc., Co. v. Baker, 95 Cal. 268, 30 P. 537 ('92); Lindsay, etc., Co. v. Mehrtens, 97 Cal. 670, 32 P. 802 ('93); Fallbrook Irr. Dist. v. Bradley, 17 Sup. Ct. 56, 164 U. S. 112 ('96); Crawford Co. v. Hathaway, — Neb. —, 93 N. W. 781 ('03).

(38) McCrary v. Bandry, 67 Cal. 120, 7 P. 264 ('85); Santa Cruz v. Enright, 95 Cal. 105, 30 P. 197 ('92).

(39) See const. and statutes, *post*, Part X; cases cited notes 37, 38.

(40) *Ante*, §§10, 11.

(41) Lorenz v. Jacob, 63 Cal. 73 ('83); Consolidated, etc., Co. v. Central P. Ry. Co., 51 Cal. 269 ('76).

(42) Strickler v. City of Colo. Spgs., 16 Colo. 61, 26 P. 313 ('91).

is also held that the word "manufacturing," used in the Colorado constitution, authorizes the condemnation of a right of way for a ditch to convey water to furnish power to an electric light plant. (43)

§ 163. Construction and Maintenance of Ditch.

Without reference to the manner in which a right of way is acquired, whether by grant, prescription, or condemnation, the acquisition of the right of way carries with it, *ipso facto*, the right to enter upon the premises for the purpose of constructing the ditch or reservoir and keeping it in repair. The right of way is an easement, but does not give its owner the right to commit a trespass upon the servient estate. It includes secondary easements, however, such as the right to enter upon the premises to make necessary repairs on the ditch or to do any other thing necessary to the enjoyment of the ditch owner's right. (44) A prior appropriator of water from a stream upon the public domain acquires a perfect right to maintain his ditch as against a subsequent settler or purchaser from the United States; and such right carries with it the right to do all that is necessary to maintain the ditch and keep the water flowing therein, such as removing obstructions from the main channel of the stream. But this right is held to the narrowest limits compatible with the enjoyment of the principal easement, which is the right to the use of the water. (45) It has been held in Nebraska that an appropriator may, by tendering compensation, proceed to divert the water as against a riparian proprietor, without waiting for the determination of a condemnation proceeding. (46)

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(43) Lamborn v. Bell, 18 Colo. 346, 32 P. 989 ('93); *ante* §161; Colo. Const., Art. 16, §6.

(44) Hargrave v. Cook, 108 Cal. 72, 41 P. 18 ('95); Joseph v. Ager, 108 Cal. 517, 41 P. 422 ('95).

(45) Ware v. Walker, 70 Cal. 591, 12 P. 475 ('86); Crisman v. Heiderer, 5 Colo. 589 ('81).

(46) Crawford Co. v. Hathaway, 61 Neb. 317, 85 N. W. 781, 797 ('03); McCook Irr. & W. P. Co. v. Crews [Neb.], 96 N. W. 996 ('03).

CHAPTER 30.

PROCEDURE UNDER EMINENT DOMAIN ACTS.

§ 164. Form of Action—Procedure—Waiver of Necessity.

The form of the proceeding to condemn a right of way differs in the various states and territories, being regulated by statute. It is held in Colorado that the Code of Civil Procedure does not apply to these actions.(47) In Warner v. Town of Gunnison(48) the court discussed the question as to whether or not the party seeking the right of way should first make application to the owner of the land and be refused before he could institute proceedings in condemnation, but the question was not decided. In a case where an alleged right of way for the carriage of water through an irrigation ditch already constructed is controverted in a civil action under appropriate pleadings, it was held that the court may determine the controversy, notwithstanding the action is not a proceeding to condemn a right of way under the act of eminent domain. (49) The jury appointed to try the question of damages caused by taking land for a right of way for a ditch, cannot try the question of the necessity for taking the land; and by demanding a jury and voluntarily trying the question of damages, the respondent is held to have waived his right to have the preliminary question of the necessity of taking the land for the ditch submitted to a commission. (50)

§ 165. Compensation and Damages.

The very life of every eminent domain act is its provision for compensation. The constitutional inhibition against the taking of private property for a public purpose without compensation, makes such a

(47) Knoth v. Barclay, 8 Colo. 300, 6 P. 924 ('85); Tripp v. Overocker, 7 Colo. 72, 1 P. 695 ('83).
(48) 2 Colo. App. 430, 31 P. 238 ('92).
(49) Saint v. Guerrerio, 17 Colo. 448, 30 P. 335 ('92).
(50) Thompson v. DeWeese-Dye D. & R. Co., 25 Colo. 243, 53 P. 507 ('98).

provision an absolute necessity. (51) Where a party appropriates the land of another for the purpose of building a ditch, canal or reservoir, without seeking to condemn or to compensate the owner, the latter may proceed under the statute and compel compensation therefor. (52) The tribunal that ascertains and fixes the compensation to be paid is designated by statute. In Colorado this may be done either by a board of commissioners or by a jury. (53) In assessing the damages and fixing the compensation, the injuries to the residue of the lands by seepage and percolation should be anticipated and the damages for the same should be included in the original assessment; no subsequent recovery for such injuries will be allowed unless negligence or unskillful management is shown. (54) As we have seen, a settler who has taken no steps to secure title to the public domain can only recover for the injury to his improvements; (55) and a settler who initiates his title and receives his patent after the construction of a ditch or canal is begun, cannot recover any damages for its crossing his lands. (56) Where the land sought to be taken is covered by water and there is no question as to the title to the water other than that which comes from the ownership of the land beneath, the compensation recoverable is limited to the value of that part of the land taken, and the injury to the other property not taken. (57)

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(51) Tripp v. Overocker, 7 Colo. 72, 1 P. 695 ('83); Burnham v. Freeman, 11 Colo. 601, 19 P. 761 ('88); Downing v. Moore, 12 Colo. 316, 20 P. 766 ('88); Nippel v. Forker, 9 Colo. App. 106, 47 P. 766 ('97).

(52) Beaver Brook Res. Co. v. St. Vrain Res. Co., 6 Colo. App. 130, 39 P. 132 ('95).

(53) Sand Cr. Lateral Irr. Co. v. Davis, 17 Colo. 326, 29 P. 742 ('92).

(54) Denver City Irr. & Water Co. v. Middaugh, 12 Colo. 434, 21 P. 565 ('89). In the following cases the form and sufficiency of the award are discussed—Sand Creek, etc., Co. v. Davis, 17 Colo. 326, 29 P. 742 ('92); San Luis L. C. & I. Co. v. Kenilworth C. Co. 3 Colo. App. 244, 32 P. 860 ('93); Otero C. Co. v. Fosdick, 20 Colo. 522, 39 P. 322 ('95).

(55) *Ante*, §160, note 11.

(56) Farmers' High Line C. & Res. Co. v. Moore, 22 Colo. 560, 45 P. 437 ('96).

(57) Siedler v. Seeley, 8 Colo. App. 499, 46 P. 848 ('96).

PART IX.

TAXATION.

CHAPTER 31.

TAXING DITCHES, FLUMES AND HEADGATES.

§ 166. Taxing Ditches as Property—Statutes Exempting.

The right to use water for any beneficial purpose, and the ditch or canal through which it is conveyed, are property rights, and being property are subject to taxation unless expressly exempt by statute. (1) This rule would apply to such rights as are acquired by appropriation where these rights are declared property rights. (2) It does not apply to the enlarged rights of a riparian proprietor in the semi-arid states to make beneficial use of the water for irrigation as well as domestic purposes. This latter right is not the result of any act on the part of the riparian owner, but is a part and parcel of the riparian soil, and a taxation of the latter, therefore, taxes the former (3) A number of the states and territories have constitutional and statutory provisions exempting ditches and water rights from taxation. In Colorado by the constitution (4) it is provided that:

"Ditches, canals and flumes, owned and used by individuals or corporations for irrigating lands owned by such individuals or corporations, or the individual members thereof, shall not be separately taxed so long as they shall be owned and used exclusively for such purpose"

The state of Utah has a statutory provision in almost the same language. (5) Arizona, by the act

(1) Empire L. & C. Co. v. Bd. Co. Com. Rio Grande Co., 21 Colo. 244, 249, 40 P. 499 ('95).
(2) *Ante*, §40.
(3) For discussion of riparian rights, see *ante*, §§16-19.
(4) Art. 10, §3.
(5) Rev. Stat. '98, §2503.

of 1899, (6) exempted all reservoirs, canals and other property used for the development, conservation, storage and distribution of water for mining, manufacturing or agricultural purposes for a period of fifteen years after completion, subject to certain conditions. This act was repealed by the act of 1901, (7) and re-enacted by the act of 1903. (8) New Mexico exempts such property for a period of six years from the commencement of construction. (9) Oklahoma, by an act for the encouragement of irrigation, (10) gives a rebate on taxes for the construction of dams, ponds and reservoirs to be used in irrigation, while Idaho (11) and Montana (12) make special provision for the taxation of canals, ditches, flumes and their franchises.

§ 167. Statutes Taxing and Exempting Construed.

In assessing ditch, canal or reservoir properties, the excavated ditch, canal or reservoir with flumes and headgates, as the vehicle for the transportation or storage of water, should be considered in levying taxes. (13) The provision of the Colorado constitution (14) was adopted to relieve from separate taxation only those canals which are exclusively used for irrigating lands owned by those who own the canal in whole or in part. The word "exclusively" relates to the persons or corporations who, as owners, make use of the canal, and not to the character or nature of that use. (15) A corporation owning a ditch constructed for the purpose of selling and disposing of water rights, (16) together with parcels of land owned by the corporation, on condition that

(6) Sess. L. '99, p. 20.
(7) Rev. Stats. '01, §2, ch. 1, Final Title.
(8) Sess. L. '03, p. 149.
(9) Comp. Laws '97, §1758.
(10) Rev. Stat. '03, §§3301-3304.
(11) 1 Codes '01, §1356.
(12) 1 Codes '05, §3719.
(13) Empire Land & Canal Co. v. Co. Treas. Rio Grande Co., 1 Colo. App. 205, 28 P. 484 ('91).
(14) Art. 10, §3, quoted in preceding section.
(15) Empire L. and C. Co. v. Board of Co. Com'rs, 21 Colo. 244, 40 P. 499 ('95).
(16) *Ante*, §129.

when all or most of such rights are sold, the price thereof paid, the ditch, appurtenances, stock and franchise may pass to those who purchased the water rights,(17) is not within the provision of the Colorado constitution,(18) and its property is taxable.(19) The court holds that it is evident that the intention was only to exempt in cases where the ditch and water right could be regarded under the decisions as appurtenant(20) and the land taxed to cover the increased value so as to prevent double taxation.(21) Exemptions from taxation are to be strictly construed and cannot be enlarged by construction. The privilege must be limited to the very terms of the law under which it is claimed.(22) The water system for selling water to the inhabitants of a city and used in conveying the water from the river to such city is not exempt from taxation under the Utah statute.(23)

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(17) *Ante*, §129.
(18) *Post*, §386*a*.
(19) *Ante*, §§119-121.
(20) *Ante*, §130.
(21) Empire L. & C. Co. v. Co. Treas., 1 Colo. App. 205, 28 P. 482 ('91); Murray, Rec., v. Board Co. Com'rs, 28 Colo. 427, 65 P. 26 ('01).
(22) *Id.*
(23) Bear River Irr. Co. v. Ogden City, 8 Utah 494, 33 P. 135 ('93).

PART X.

STATUTES AND FORMS.

CHAPTER 32.

FEDERAL STATUTES AND FORMS.

(*a*) *Statutes.*

RIGHTS OF WAY AND RESERVOIR SITES.

An Act granting the right of way to ditch and canal owners over the public lands and for other purposes.—*Approved July 26, 1866, Rev. St.*, §2339, 14 *Stat.* 253, *ch.* 263.

§ 168. Act of July 26, 1866, Rights of Way for Ditches.

Sec. (2339) Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of the courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.

An Act to amend, "An Act granting the right of way to ditch and canal owners over the public lands and for other purposes." —*Approved July 9, 1870, Rev. St.*, §2340, 16 *Stat.* 218, *ch.* 236, §17.

§ 169. Land Patents Subject to Accrued Water Rights.

Sec. (2340) All patents granted, or pre-emption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by the preceding section.

Rider upon the Sundry Civil Appropriation Bill for June 30, 1889.—*Approved October 2, 1888, 25 Stat.* 505, 526, *ch.* 1064, *Rev. St.* (1 *Supp.*, 2 *ed.*) 626, *par.* 4.

§ 170. Appropriation—Investigating Arid Region—Segregation of Arid Lands—Selection of Sites for Reservoirs and Other Works.

For the purpose of investigating the extent to which the arid region of the United States can be redeemed by irrigation, and the segregation of the irrigable lands in such arid region, and for the selection of sites for reservoirs and other hydraulic works necessary for the storage and utilization of water for irrigation and the prevention of floods and overflows, and to make the necessary maps, including the pay of employees in field and in office, the cost of all instruments, apparatus, and materials, and all other necessary expenses connected therewith, the work to be performed by the geological survey, under the direction of the secretary of the interior, the sum of one hundred thousand dollars or so much thereof as may be necessary. And the director of the geological survey under the supervision of the secretary of the interior, shall make a report to congress on the first Monday in December of each year, showing in detail how the said money has been expended, the amount used for actual survey and engineer work in the field in locating sites for reservoirs and an itemized account of the expenditures under this appropriation. And all the lands which may hereafter be designated or selected by such United States surveys for sites for reservoirs, ditches or canals for irrigation purposes, and all the lands made susceptible of irrigation by such reservoirs, ditches or canals are from this time henceforth hereby reserved from sale as the property of the United States, and shall not be subject after the passage of this act, to entry, settlement or occupation until further provided by law.

Rider upon Sundry Civil Appropriation Bill.—*Approved August* 30, 1890, 26 *Stat.* 371, 391 *ch.* 837, *Rev. St.* (1 *Supp.* 2 *ed.*) 791-792, *par.* 3.

§ 170*a*. Withdrawal of Lands Repealed—Reservoir Sites Remain Segregated.

So much of the Act of October secend, eighteen hundred and eighty-eight, entitled "An Act making appropriations for sunday civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and eighty-nine, and for other purposes, as provides for the withdrawal of the public lands from entry, occupation and settlement, is hereby repealed, and all entries made or claims initiated in good faith and valid but for said Act, shall be recognized and may be perfected in the same manner as if said law had not been enacted, except that reservoir sites heretofore located or selected shall remain segregated and reserved from entry or settlement, as provided by said Act, until otherwise provided by law, and reservoir sites hereafter located or selected on public lands shall in like manner be reserved from the date of the location or selection thereof.

Rider upon Sundry Civil Appropriation Bill.—*Approved March* 2, 1889, 25 *Stat.* 939, 960, *ch.* 411, *Rev. St.* (1 *Supp.* 2 *ed.*) 698, *par.* 4.

§ 171. Appropriation—Investigating Arid Region—Segregation of Arid Lands—Selection of Sites for Reservoirs and Other Works.

Irrigation Survey: For the purpose of investigating the extent to which the arid region of the United States can be redeemed by irrigation and the segregation of irrigable lands in such arid region, and for the selection of sites for reservoirs and other hydraulic works necessary for the storage and utilization of water for irrigation and for ascertaining the cost thereof, and the prevention of floods and overflows, and to make the necessary maps, including the pay of employees in field, and in office, the cost of all instruments, apparatus, and materials, and all other necessary expenses connected therewith, the work to be performed by the geological survey under the direction of the secretary of the interior, two hundred and fifty thousand dollars, of which sum fifty thousand dollars shall be immediately available; and the director of the geological survey, under the supervision of the secretary of the interior, shall make a report to congress on the first Monday in December of each year, showing in detail how the said money has been expended, the amount used for actual survey and engineer work in the field in locating sites for reservoirs, and an itemized account of the expenditures under this and any future appropriation.

Rider upon "An Act to repeal timber culture laws and for other purposes."— *Approved March* 3, 1891, 26 *Stat.* 1101, *ch.* 561, *Rev. St.* (1 *Supp.*, 2 *ed.*) 945.

§ 172. Reservoir Sites—Right of Way Through Public Lands for Ditches and Canals—Extent of—Filings Necessary.

(Sec. 17) That reservoir sites located or selected and to be located and selected under the provisions of "An Act making appropriations for sundry civil expenses of the government for the fiscal year ending June thirtieth, eighteen hundred and eighty-nine, and for other purposes," and amendments thereto, shall be restricted to and shall contain only so much land as is actually necessary for the construction and maintenance of reservoirs; excluding so far as practicable lands occupied by actual settlers at the date of the location of said reservoirs and that the provision of "An Act making appropriations for sundry civil expenses of the government for the fiscal year ending June thirtieth, eighteen hundred and ninety-one, and for other purposes," which reads as follows, viz: "No person who shall after the passage of this act enter upon any of the public lands with a view to occupation, entry, or settlement under any of the land laws shall be permitted to acquire title to more than three hundred and twenty acres in the aggregate under all said laws," shall be construed to include in the maximum amount of lands the title to which is permitted to be acquired by one person only agricultural lands and not to include lands entered or sought to be entered under mineral land laws. [Act referred to herein is §171 hereof.]

§ 172*a*. Right of Way—Grant of.

(Sec. 18) That the right of way through the public lands and reservations of the United States is hereby granted to

any canal or ditch company formed for the purpose of irrigation and duly organized under the laws of any state or territory, which shall have filed, or may hereafter file, with the secretary of the interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of the ground occupied by the water of the reservoir and of the canal and its laterals, and fifty feet on each side of the marginal limits thereof; also the right to take, from the public lands adjacent to the line of the canal or ditch, material, earth, and stone necessary for the construction of such canal or ditch: Provided, That no such right of way shall be so located as to interfere with the proper occupation by the government of any such reservation, and all maps of location shall be subject to the approval of the department of the government having jurisdiction of such reservation, and the privilege herein granted shall not be construed to interfere with the control of water for irrigation and other purposes under authority of the respective states or territories.

§ 172b. Maps—Time for Filing.

(Sec. 19) That any canal or ditch company desiring to secure the benefits of this Act shall, within twelve months after the location of ten miles of its canal if the same be upon surveyed lands, and if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a map of its canal or ditch and reservoir; and upon the approval thereof by the secretary of the interior the same shall be noted upon the plats in said office, and thereafter all such lands over which such rights of way shall pass shall be disposed of subject to such right of way. Whenever any person or corporation, in the construction of any canal, ditch, or reservoir, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.

§ 172c. Applies to Canals Heretofore or Hereafter Constructed.

(Sec. 20) That the provisions of this Act shall apply to all canals, ditches, or reservoirs, heretofore or hereafter constructed, whether constructed by corporations, individuals, or association of individuals, on the filing of the certificates and maps herein provided for. If such ditch, canal, or reservoir, has been or shall be constructed by an individual or association of individuals, it shall be sufficient for such individual or association of individuals to file with the secretary of the interior, and with the register of the land office where said land is located, a map of the line of such canal, ditch, or reservoir, as in case of a corporation, with the name of the individual owner or owners thereof, together with the articles of association, if any there be. Plats heretofore filed shall have the benefits of this act from the date of their filing, as though filed under it: Provided, That if any section of said canal, or ditch, shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any uncompleted section of said canal, ditch, or reservoir, to the extent that the same is not completed at the date of the forfeiture.

§ 172*d*. Right of Way—Not Occupy Except for Canal or Ditch Purposes.

(Sec. 21) That nothing in this Act shall authorize such canal or ditch company to occupy such right of way except for the purpose of said canal or ditch, and then only so far as may be necessary for the construction, maintenance and care of said canal or ditch.

An Act to provide for the use and occupation of reservoir sites.—*Approved Feby.* 26, 1897, 29 *Stat.* 599, *ch.* 335.

§ 173. Reservoir Sites—States Given Same Rights as Individuals —Charges for Water from, Subject to State Control.

Be it enacted by the senate and house of representatives of the United States of America in congress assembled, That all reservoir sites reserved or to be reserved shall be open to use and occupation under the right of way Act of March third, eighteen hundred and ninety-one. And any state is hereby authorized to improve and occupy such reservoir sites to the same extent as an individual or private corporation, under such rules or regulations as the secretary of the interior may prescribe: Provided, That the charges for water coming in whole or part from reservoir sites used or occupied under the provisions of this Act shall always be subject to the control and regulation of the respective states and territories in which such reservoirs are in whole or part situate. [The Act referred to herein is §§172-172*d* hereof.]

DESERT LANDS.

An Act to provide for the sale of desert lands in certain states and territories.—*Approved March* 3, 1877, 19 *Stat.* 377, *ch.* 108, *Rev. St.* (1 *Supp.*, 2 *ed.*) 137.

§ 174. Desert Land—Filings On—Appropriation of Water for— Water Held Free for Appropriation.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it shall be lawful for any citizen of the United States, or any person of requisite age "who may be entitled to become a citizen, and who has filed his declaration to become such" and upon payment of twenty-five cents per acre—to file a declaration under oath with the register and the receiver of the land district in which any desert land is situated, that he intends to reclaim a tract of desert land not exceeding one section, by conducting water upon the same, within the period of three years thereafter, Provided however, that the right to the use of water by the person so conducting the same, on or to any tract of desert land of six hundred and forty acres shall depend upon *bona fide* prior appropriation: and such right shall not exceed the amount of water actually appropriated, and necessarily used for the purpose of irrigation and reclamation: and all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers, and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and

manufacturing purposes subject to existing rights. Said declaration shall describe particularly said section of land if surveyed, and, if unsurveyed, shall describe the same as nearly as possible without a survey. At any time within the period of three years after filing said declaration, upon making satisfactory proof to the register and receiver of the reclamation of said tract of land in the manner aforesaid, and upon the payment to the receiver of the additional sum of one dollar per acre for a tract of land not exceeding six hundred and forty acres to any one person, a patent for the same shall be issued to him. Provided, that no person shall be permitted to enter more than one tract of land and not to exceed six hundred and forty acres which shall be in compact form. [Sec. 1.

§ 174*a*. Desert Lands—What Are.

That all lands exclusive of timber lands and mineral lands which will not, without irrigation, produce some agricultural crop, shall be deemed desert lands, within the meaning of this Act, which fact shall be ascertained by proof of two or more credible witnesses under oath, whose affidavits shall be filed in the land office in which said tract of land may be situated. [Sec. 2.

§174*b*. Localities Where Act Applies.

That this Act shall only apply to and take effect in the states of California, Oregon and Nevada, and the territories of Washington, Idaho, Montana, Utah, Wyoming, Arizona, New Mexico and Dakota, and the determination of what may be considered desert land shall be subject to the decision and regulation of the commissioner of the general land office. [Sec. 3.

An Act to repeal timber culture laws and for other purposes. —*Approved March* 3, 1891, 26 *Stat.* 1096, *ch.* 561, *Rev. St.* (1 *Supp.*, 2 *ed.*) 940.

§ 175: Desert Lands—Filing Maps Showing Plan of Irrigation —Final Proof—Show Reclamation.

That at the time of filing the declaration hereinbefore required the party shall also file a map of said land, which shall exhibit a plan showing the mode of contemplated irrigation, and which plan shall be sufficient to thoroughly irrigate and reclaim said land, and prepare it to raise ordinary agricultural crops, and shall also show the source of the water to be used for irrigation and reclamation. Persons entering or proposing to enter separate sections, or fractional parts of sections, of desert lands may associate together in the construction of canals and ditches for irrigating and reclaiming all of said tracts, and may file a joint map or maps showing their plan of internal improvements. [Sec. 4.

§ 175*a*. Amount to be Expended Before Patent.

That no land shall be patented to any person under this Act unless he or his assignors shall have expended in the necessary irrigation, reclamation, and cultivation thereof, by means of main canals and branch ditches, and in permanent improvements upon the land, and in the purchase of water rights for the irrigation of the same, at least three dollars per acre of

whole tract reclaimed and patented in the manner following: Within one year after making entry for such tract of desert land as aforesaid the party so entering shall expend not less than one dollar per acre for the purposes aforesaid: and he shall in like manner expend the sum of one dollar per acre during the second and also during the third year thereafter, until the full sum of three dollars per acre is so expended. Said party shall file during each year with the register proof, by the affidavits of two or more credible witnesses, that the full sum of one dollar per acre has been expended in such necessary improvements during such year, and the manner in which expended, and at the expiration of the third year a map or plan showing the character and extent of such improvements. If any party who has made such application shall fail during any year to file the testimony aforesaid the lands shall revert to the United States, and the twenty-five cents advanced payment shall be forfeited to the United States, and the entry shall be canceled. Nothing herein contained shall prevent a claimant from making his final entry and receiving his patent at an earlier date than hereinbefore prescribed, provided that he then makes the required proof of reclamation to the aggregate extent of three dollars per acre: Provided, That proof be further required of the cultivation of one-eighth of the land. [Sec. 5.

§ 175b. Not Affect Valid Rights Heretofore Accrued.

That this Act shall not affect any valid rights heretofore accrued under said Act of March third, eighteen hundred and seventy-seven, but all *bona fide* claims heretofore lawfully initiated may be perfected, upon due compliance with the provisions of said Act, in the same manner, upon the same terms and conditions, and subject to the same limitations, forfeitures, and contests as if this Act had not been passed; or said claims, at the option of the claimant, may be perfected and patented under the provisions of said act, as amended by this Act, so far as applicable; and all acts and parts of acts in conflict with this Act are hereby repealed. [Sec. 6.

§ 175c. Patent May Issue—When.

That at any time after filing the declaration, and within the period of four years thereafter, upon making satisfactory proof to the register and the receiver of the reclamation and cultivation of said land to the extent and cost and in the manner aforesaid, and substantially in accordance with the plans herein provided for, and that he or she is a citizen of the United States, and upon payment to the receiver of the additional sum of one dollar per acre for said land, a patent shall issue therefor to the applicant or his assigns; but no person or association of persons shall hold by assignment or otherwise prior to the issue of patent, more than three hundred and twenty acres of such arid or desert lands but this section shall not apply to entries made or initiated prior to the approval of this Act. Provided, however, that additional proofs may be required at any time within the period prescribed by law, and that the claims or entries made under this or any preceding Act shall be subject to contest, as provided by the law relating to homestead cases, for illegal inception, abandonment, or failure to comply with the

requirements of law, and upon satisfactory proof thereof shall be canceled, and the lands, and moneys paid therefor shall be forfeited to the United States. [Sec. 7.

§ 175*d*. Act Applies to Colorado.

That the provisions of the Act to which this is an amendment, and the amendments thereto, shall apply to and be in force in the state of Colorado, as well as the states named in the original Act; and no person shall be entitled to make entry of desert land except he be a resident citizen of the state or territory in which the land sought to be entered is located. [Sec. 8.

Rider upon Sundry Civil Appropriation Bill.—*Approved August* 18, 1894, 28 *Stat.* 372, 422, *ch.* 301, *Rev. St.* (2 *Supp.*) 259.

CAREY ACT.

§ 176. Segregation of Arid Lands—Reclamation of—Duties of State Officers.

(Sec. 4) That to aid the public land states in the reclamation of the desert lands therein, and the settlement, cultivation and sale thereof in small tracts to actual settlers, the secretary of the interior with the approval of the president, be, and hereby is, authorized and empowered, upon proper application of the state to contract and agree, from time to time, with each of the states in which there may be situated desert lands as defined by the Act entitled "An Act to provide for the sale of desert land in certain states and territories," approved March third, eighteen hundred and seventy-seven, (1) and the Act amendatory thereof, approved March third, eighteen hundred and ninety-one, (2) binding the United States to donate, grant and patent to the state free of cost for survey or price such desert lands, not exceeding one million acres in each state, as the state may cause to be irrigated, reclaimed, occupied, and not less than twenty acres of each one-hundred-and-sixty-acre tract cultivated by actual settlers, within ten years next after the passage of this Act, as thoroughly as is required of citizens who may enter under the said desert land law.

Before the application of any state is allowed or any contract or agreement is executed or any segregation of any of the land from the public domain is ordered by the secretary of the interior, the state shall file a map of the said land proposed to be irrigated which shall exhibit a plan showing the mode of the contemplated irrigation and which plan shall be sufficient to thoroughly irrigate and reclaim said land and prepare it to raise ordinary agricultural crops and shall also show the source of the water to be used for irrigation and reclamation, and the secretary of the interior may make necessary regulations for the reservation of the lands applied for by the states to date from the date of the filing of the map and plan of irrigation, but such reservation shall be of no force whatever if such map and plan of irrigation shall not be approved. That any state contracting under this section is hereby authorized to make all necessary contracts to cause the said lands to be reclaimed, and to induce their settlement and cultivation in accordance with and subject to the pro-

visions of this section; but the state shall not be authorized to lease any of said lands or to use or dispose of the same in any way whatever, except to secure their reclamation, cultivation and settlement.

As fast as any state may furnish satisfactory proof according to such rules and regulations as may be prescribed by the secretary of the interior, that any of said lands are irrigated, reclaimed and occupied by actual settlers, patents shall be issued to the state or its assigns for said lands so reclaimed and settled: Provided, That said states shall not sell or dispose of more than one hundred and sixty acres of said lands to any one person, and any surplus of money derived by any state from the sale of said lands in excess of the cost of their reclamation, shall be held as a trust fund for and be applied to the reclamation of other desert lands in such state. That to enable the secretary of the interior to examine any of the lands that may be selected under the provisions of this section, there is hereby appropriated out of any moneys in the treasury, not otherwise appropriated, one thousand dollars. [The Acts referred to herein are (1) 19 Stat. 377, *supra* §§174-174*b*, (2) *supra*, §§175-175*d*.]

Rider upon An Act making appropriations for District of Columbia.—*Approved July* 11, 1896, 29 *Stat.* 434.

§177. That under any law heretofore or hereafter enacted by any state, providing for the reclamation of arid lands, in pursuance and acceptance of the terms of the grant made in section four of an Act entitled, "An Act making appropriations for the sundry civil expenses of the government for the fiscal year ending June thirtieth, eighteen hundred and ninety-five," approved August eighteenth, eighteen hundred and ninety-four, a lien or liens, is hereby authorized to be created by the state to which such lands are granted and by no other authority whatever, and when created shall be valid on and against the separate legal subdivisions of land reclaimed, for the actual cost and necessary expenses of reclamation and reasonable interest thereon from the date of reclamation until disposed of to actual settlers; and when an ample supply of water is actually furnished in a substantial ditch or canal, or by artesian wells or reservoirs, to reclaim a particular tract or tracts of such lands, then patents shall issue for the same to such state without regard to settlement or cultivation: Provided, That in no event, in no contingency, and under no circumstances shall the United States be in any manner directly or indirectly liable for any amount of any such lien or liability, in whole or in part. [Act referred to herein is §176 hereof.]

RECLAMATION SERVICE.

An Act appropriating the receipts from the sale and disposal of public lands in certain states and territories to the construction of irrigation works for the reclamation or arid lands.—*Approved June* 17, 1902, 32 *Stat.* 388, *ch.* 1093.

§ 178. "Reclamation Act."

Be it enacted by the senate and house of representatives of the United States of America in congress assembled, That all

moneys received from the sale and disposal of public lands in Arizona, California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Utah, Washington, and Wyoming, beginning with the fiscal year ending June thirtieth, nineteen hundred and one, including the surplus of fees and commissions in excess of allowances to registers and receivers, and excepting the five per centum of the proceeds of the sales of public lands in the above states set aside by law for educational and other purposes, shall be, and the same are hereby, reserved, set aside, and appropriated as a special fund in the treasury to be known as the "reclamation fund," to be used in the examination and survey for and the construction and maintenance of irrigation works for the storage, diversion, and development of waters for the reclamation of arid and semi-arid lands, in the said states and territories, and for the payment of all other expenditures provided for in this Act: Provided, That in case the receipts from the sale and disposal of public lands other than those realized from the sale and disposal of lands referred to in this section are insufficient to meet the requirements for the support of agricultural colleges in the several states and territories, under the Act of August thirtieth, eighteen hundred and ninety, (1) entitled, "An Act to apply a portion of the proceeds of the public lands to the more complete endowment and support of the colleges for the benefit of agriculture and the mechanic arts, established under the provisions of an Act of congress approved July second, eighteen hundred and sixty-two," (2) the deficiency, if any, in the sum necessary for the support of the said colleges shall be provided for from any moneys in the treasury not otherwise appropriated. [The Acts referred to herein are 26 Stat. 417, and 12 Stat. 503, respectively.]

§ 178*a*. (Sec. 2) That the Secretary or the Interior is hereby authorized and directed to make examinations and surveys for, and to locate and construct, as herein provided, irrigation works for the storage, diversion, and development of waters, including artesian wells, and to report to congress at the beginning of each regular session as to the results of such examinations and surveys, giving estimates of cost of all contemplated works, the quantity and location of the lands which can be irrigated therefrom, and all facts relative to the practicability of each irrigation project: also the cost of works in process of construction as well as of those which have been completed.

§ 178*b*. (Sec. 3) That the Secretary of the Interior shall, before giving the public notice provided for in section four of this act, withdraw from public entry the lands required for any irrigation works contemplated under the provisions of this act, and shall restore to public entry any of the lands so withdrawn when, in his judgment, such lands are not required for the purposes of this act; and the secretary of the interior is hereby authorized, at or immediately prior to the time of beginning the surveys for any contemplated irrigation works, to withdraw from entry, except under the homestead laws, any public lands believed to be susceptible of irrigation from said works: *Provided*, That all lands entered and entries made under the homestead laws within areas so withdrawn during such withdrawal shall be subject to all the provisions,

limitations, charges, terms, and conditions of this act; that said surveys shall be prosecuted diligently to completion, and upon the completion thereof, and of the necessary maps, plans, and estimates of cost, the secretary of the interior shall determine whether or not said project is practicable and advisable, and if determined to be impracticable or unadvisable he shall thereupon restore said lands to entry; that public lands which it is proposed to irrigate by means of any contemplated works shall be subject to entry only under the provisions of the homestead laws in tracts of not less than forty nor more than one hundred and sixty acres, and shall be subject to the limitations, charges, terms, and conditions herein provided: *Provided*, That the commutation provisions of the homestead laws shall not apply to entries made under this act.

§ 178*c*. (Sec. 4) That upon the determination by the secretary of the interior that any irrigation project is practicable, he may cause to be let contracts for the construction of the same, in such portions or sections as it may be practicable to construct and complete as parts of the whole project, providing the necessary funds for such portions or sections are available in the reclamation fund, and thereupon he shall give public notice of the lands irrigable under such project, and limit of area per entry, which limit shall represent the acreage which, in the opinion of the secretary, may be reasonably required for the support of a family upon the lands in question; also of the charges which shall be made per acre upon the said entries, and upon lands in private ownership which may be irrigated by the waters of the said irrigation project, and the number of annual installments not exceeding ten, in which such charges shall be paid and the time when such payments shall commence. The said charges shall be determined with a view of returning to the reclamation fund the estimated cost of construction of the project, and shall be apportioned equitably: *Provided*, That in all construction work eight hours shall constitute a day's work, and no Mongolian labor shall be employed thereon.

§ 178*d*. (Sec. 5) That the entryman upon lands to be irrigated by such works shall, in addition to compliance with the homestead laws, reclaim at least one-half of the total irrigable area of his entry for agricultural purposes, and before receiving patent for the lands covered by his entry shall pay to the government the charges apportioned against such tract, as provided in section four. No right to the use of water for land in private ownership shall be sold for a tract exceeding one hundred and sixty acres to any one landowner, and no such sale shall be made to any landowner unless he be an actual *bona fide* resident on such land, or occupant thereof residing in the neighborhood of said land, and no such right shall permanently attach until all payments therefor are made. The annual installments shall be paid to the receiver of the local land office of the district in which the land is situated, and a failure to make any two payments when due shall render the entry subject to cancellation, with the forfeiture of all rights under this act, as well as of any moneys already paid thereon. All moneys received from the above sources shall be paid into the reclamation fund. Registers and receivers shall be allowed the usual commissions on all moneys paid for lands entered under this act.

§ 178*e*. (Sec. 6) That the Secretary of the Interior is hereby authorized and directed to use the reclamation fund for the opera-

tion and maintenance of all reservoirs and irrigation works constructed under the provisions of this act: *Provided*, That when the payments required by this act are made for the major portion of the lands irrigated from the waters of any of the works herein provided for, then the management and operation of such irrigation works shall pass to the owners of the lands irrigated thereby, to be maintained at their expense under such form of organization and under such rules and regulations as may be acceptable to the Secretary of the Interior: *Provided*, That the title to and the management and operation of the reservoirs and the works necessary for their protection and operation shall remain in the government until otherwise provided by congress.

§ 178*f*. (Sec. 7) That where in carrying out the provisions of this act it becomes necessary to acquire any rights or property, the secretary of the interior is hereby authorized to acquire the same for the United States by purchase or by condemnation under judicial process, and to pay from the reclamation fund the sums which may be needed for that purpose, and it shall be the duty of the Attorney-General of the United States upon every application of the Secretary of the Interior, under this act, to cause proceedings to be commenced for condemnation within thirty days from the receipt of the application at the Department of Justice.

§ 178*g*. (Sec. 8) That nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any state or territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the secretary of the interior, in carrying out the provisions of this act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any state or of the federal government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: *Provided*, That the right to the use of water acquired under the provisions of this act shall be appurtenant to the land irrigated and beneficial use shall be the basis, the measure, and the limit of the right.

§ 178*h*. (Sec. 9) That it is hereby declared to be the duty of the secretary of the interior in carrying out the provisions of this act, so far as the same may be practicable and subject to the existence of feasible irrigation projects, to expend the major portion of the funds arising from the sale of public lands within each state and territory hereinbefore named for the benefit of arid and semi-arid lands within the limits of such state or territory: *Provided*, That the secretary may temporarily use such portion of said funds for the benefit of arid or semi-arid lands in any particular state or territory hereinbefore named as he may deem advisable, but when so used the excess shall be restored to the fund as soon as practicable, to the end that ultimately, and in any event, within each ten-year period after the passage of this act, the expenditures for the benefit of the said states and territories shall be equalized according to the proportions and subject to the conditions as to practicability and feasibility aforesaid.

§ 178*i*. (Sec. 10) That the secretary of the interior is hereby authorized to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this act into full force and effect.

An Act authorizing the changing of the levels of certain lakes and the disposal of certain lands under the terms of the National Reclamation Act.—*Approved February* 9, 1905, 33 *Stat.* 714, *ch.* 567.

§ 179. Changing Levels of Lakes Klamath, Tule, Rhett and Goose.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the secretary of the interior is hereby authorized in carrying out any irrigation project that may be undertaken by him under the terms and conditions of the national reclamation Act and which may involve the changing of the levels of Lower or Little Klamath Lake, Tule or Rhett Lake, and Goose Lake, or any river or other body of water connected therewith, in the states of Oregon and California, to raise or lower the level of said lakes as may be necessary and to dispose of any lands which may come into the possession of the United States as a result thereof by cession of any state or otherwise under the terms and conditions of the national reclamation Act.

An Act relating to the construction of a dam and reservoir on the Rio Grande in New Mexico for impounding of the flood waters of said river for purposes of irrigation.—*Approved February* 25, 1905, 33 *Stat.* 814, *ch.* 798.

§ 180. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions of the reclamation Act approved June seventeenth, nineteen hundred and two, shall be extended for the purposes of this Act to the portion of the state of Texas bordering upon the Rio Grande which can be irrigated from a dam to be constructed near Engle, in the territory of New Mexico, on the Rio Grande, to store the flood waters of that river, and if there shall be ascertained to be sufficient land in New Mexico and in Texas which can be supplied with the stored water at a cost which shall render the project feasible and return to the reclamation fund the cost of the enterprise, then the secretary of the interior may proceed with the work of constructing a dam on the Rio Grande as part of the general system of irrigation, should all other conditions as regards feasibility be found satisfactory.

IRRIGABLE LANDS IN NEBRASKA.

An Act to amend the homestead laws as to certain unappropriated and unreserved lands in Nebraska.—*Approved April* 28, 1904, 33 *Stat.* 547, *Ch.* 1081.

§ 181. Homestead Entries for 640 Acres Allowed on Certain Lands —Irrigable Lands Excluded.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That from and after sixty days after the approval of this Act entries made under the homestead laws in the state of Nebraska west and north of the following line, to wit: Beginning at a point on the boundary line between the states of South Dakota and Nebraska where the first guide meridian west of the sixth principal meri-

dian strikes said boundary; thence running south along said guide meridian to its intersection with the fourth standard parallel north of the base line between the states of Nebraska and Kansas; thence west along said fourth standard parallel to its intersection with the second guide meridian west of the sixth principal meridian; thence south along said second guide meridian to its intersection with the third standard parallel north of the said base line; thence west along said third standard parallel to its intersection with the range line between ranges twenty-five and twenty-six west of the sixth principal meridian; thence south along said line to its intersection with the second standard parallel north of the said base line; thence west on said standard parallel to its intersection with the range line between ranges thirty and thirty-one west; thence south along said line to its intersection with the boundary line between the states of Nebraska and Kansas, shall not exceed in area six hundred and forty acres, and shall be as nearly compact in form as possible, and in no event over two miles in extreme length: Provided, That there shall be excluded from the provisions of this Act such lands within the territory herein described as in the opinion of the secretary of the interior it may be reasonably practicable to irrigate under the national irrigation law, or by private enterprise; and that said secretary shall, prior to the date above mentioned, designate and exclude from entry under this Act the lands, particularly along the North Platte River, which in his opinion it may be possible to irrigate as aforesaid; and shall thereafter, from time to time, open to entry under this Act any of the lands so excluded, which, upon further investigation, he may conclude can not be practically irrigated in the manner aforesaid.

PHILIPPINE ISLANDS.

An Act temporarily to provide for the administration of the affairs of civil government in the Philippine Islands, and for other purposes.—*Approved July* 1, 1902, 32 *Stat.* 691, 697, 704, *ch.* 1369.

§ 182. Appropriation and Beneficial Use of Water in Philippine Islands.

(Sec. 19) That the beneficial use shall be the basis, the measure, and the limit of all rights to water in said islands, and the government of said islands is hereby authorized to make such rules and regulations for the use of water, and to make such reservations of public lands for the protection of the water supply, and for other public purposes not in conflict with the provisions of this Act, as it may deem best for the public good.

§ 183. Local Customs—Right of Way—Damages.

(Sec. 50) That whenever by priority of possession rights to the use of water for mining, agricultural, manufacturing, or other purposes have vested and accrued and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same, and the right of way for the construction of ditches and canals for the

purposes herein specified is acknowledged and confirmed, but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.

§ 184. Patents—Subject to Accrued Rights.

(Sec. 51) That all patents granted shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights as may have been acquired under or recognized by the preceding section.

(b) Forms.

§ 184a. Notice of Appropriation by the United States.

This general form may be changed, of course, to meet the requirements of local laws.

FORM OF NOTICE OF WATER APPROPRIATION.

....., Engineer, United States Geological Survey, thereunto duly authorized by the secretary of the interior, for and on behalf of the United States of America, under the provisions of the act of congress approved June seventeenth, nineteen hundred and two (32 Stat. L., 388), claims, at the point where this notice is posted, all the unappropriated waters of the .....River, both surface and underflow, more specifically stated as amounting to.....cubic feet per second.

This notice is posted on....., 190.., on a .....tree on the.....bank of the..... .....River, in sec.....T.....R....., ...M., at a point distant.....feet and bearing .....from the.....corner of said section.

The water is to be used for irrigation, domestic, power, mechanical, and other beneficial uses in and upon lands situated in.....counties, and located in the following townships: ....

The water hereby appropriated is to be stored by means of a dam located in sec....., T....., R..... in a reservoir located in Ts....., R....., and will be conducted to the points of intended use by means of canals, flumes, pipes, tunnels, or other appropriate means of conveying water, of the following dimensions, ..., or such other equivalent dimensions and grade as will give a capacity of..... cubic feet per second.

AFFIDAVIT.

.....being duly sworn, deposes and says that on....., 190.., he did post a notice of appropriation of water, of which the foregoing is a copy, for..... cubic feet per second of the waters of..... River, on a.....tree at a point described as follows: .... (Describe exactly as in notice.)

Following is a copy of a notice actually filed with the recorder of Riverside County, Cal., and posted as indicated:

Notice is hereby given that Edmund T. Perkins, thereunto duly authorized by the secretary of the interior, for and on behalf of the United States of America, and under the provisions of an Act of congress approved June 17, 1902, claims at the point where this notice is posted all unappropriated waters of the Colorado River, both surface and under flow, to the extent of 100,000 cubic second-feet—4,000,000 miners' inches. The point where this notice is posted is described as follows: A point of rocks known as Black Point, in California, county of Riverside, about section 7, township 5 south, range 24 east, San Bernardino meridian, California. The notice is posted on a box nailed to a tree.

The said water is claimed for irrigation, manufacturing purposes, water power, domestic use, and other beneficial uses, and the terminus and place of its intended use is in the valley extending from said point along the Colorado River to and below Picacho Cal., and along the line of a proposed conduit. The water will be diverted by means of a diversion dam and will be conveyed through canals, flumes, wooden, iron, steel, and cement pipes to the place of intended use. The size of the canal will be 100 feet wide on the bottom and 10 feet deep, or of such dimensions as will give it an equivalent capacity. The size of the conduits are to be such as to give them sufficient capacity to carry the amount of water required.

§ 184*b*. Form of Incorporation Used by Salt River Valley Water Users' Association, Arizona.

ARTICLES OF INCORPORATION.

Know all men by these articles of incorporation that we, the undersigned, have associated ourselves together under the laws of the territory of Arizona as a body corporate.

ARTICLE I.

The name of the corporation shall be and is Salt River Valley Water Users' Association.

ARTICLE II.

The names of the incorporators are: .....
.....but others may become members of said association by subscribing to these articles of incorporation, or a copy thereof, or by the transfer of stock to them in the regular course of the administration of the affairs of the association.

ARTICLE III.

The principal place of transacting the business of the association shall be at the city of Phœnix, in the county of Maricopa, in the territory of Arizona.

ARTICLE IV.

Section 1. The objects for which the association is organized and the general nature of the business to be transacted by it shall be and are:

To provide for and distribute and furnish to the lands of the holders of shares of said association to which said shares and the rights and interests represented thereby are appurtenant an adequate supply of water for the irrigation of said lands.

To divert water within the territory of Arizona from the public sources of water supply, to impound water and develop sources of water, to pump water from underground sources, to carry and distribute water for the irrigation of the lands aforesaid, and to construct, purchase, lease, condemn, or otherwise in any way whatsoever acquire and own, hold, have, use, control, maintain, preserve, manage, operate, and conduct the means therefor and any and all rights, reservoirs, dams, canals, ditches, flumes, head gates, pipes, machinery, wells, pumps, pumping plants, power houses, transmission lines, and property, both real and personal, of every nature and kind whatsoever necessary or appropriate for the accomplishment of any of the objects or purposes aforesaid.

To divert, impound, develop, pump, distribute, deliver, and use water for all beneficial uses and purposes from surface and subterranean sources by any means adapted to any of the purposes aforesaid, and create, transmit, and use power for the accomplishment of any of the purposes or objects of the association as hereinbefore set forth.

To have and exercise all the powers, and do all and everything necessary, suitable, convenient, or proper for the accomplishment of any of the purposes or the attainment of any one or more of the objects herein enumerated or incidental to the powers herein named or which shall at any time appear conducive or expedient for the protection or benefit of the association or its members as shareholders therein.

Sec. 2. For the accomplishment or to aid in and promote the accomplishment of the aforesaid purposes or objects, or any of them, this association shall have power to enter into any contract or other arrangement or undertake in whatsoever manner and by whatsoever means may be deemed proper or convenient therefor, to secure action by or the aid of the United States government in the construction, erection, or acquisition of any dams, reservoirs, canals, wells, or other works or property or appurtenances necessary thereunto for the storage, development, diversion, distribution, or delivery of water to the lands of the shareholders of this association, or to aid therein, and to enter into any agreement with said government which may be approved by the secretary of the interior or any duly authorized official or representative of the interior department with reference to the collection and payment to the government of any and all moneys which may be due the government under or by reason of rights issued by the government to members of this association for the use of water from any reservoir or irrigation works acquired or constructed by said government, or in the acquisition or construction of which it may have aided, and to comply with any conditions, rules, or regulations prescribed by congress or by any executive department or official of said government lawfully authorized thereunto, concerning the storage, diversion, delivery, application, or use of any water so stored, developed, or delivered to the shareholders of this association from or by means of any works constructed or acquired by the government

or in the construction or acquisition of which the government may have aided, or which it may hereafter construct or acquire, or in the construction or acquisition of which it may hereafter aid.

Sec. 3. The territory within which are the lands to be irrigated as aforesaid shall be known as the Salt River Reservoir District, and shall include lands within the boundaries described as follows, that is to say:.....
together with any public or other lands on which rights to the use of water from reservoir or irrigation works referred to in section 2 of this article shall be issued by the secretary of the interior.

ARTICLE V.

Section 1. The capital stock of the association shall be $3,750,000, and be divided into 250,000 shares of the par value of $15 per share.

Sec. 2. Those and those only who are owners of land, or occupants of public lands having initiated a right to acquire the same, within the territory described in Article IV. of these articles of incorporation, or within such extensions thereof as may be hereafter made from time to time under the powers herein conferred for that purpose, shall be the holders or owners of shares of the capital stock of this association. For each acre of such lands shareholders may become the owner of one share of stock of this association and no more.

Sec. 3. As a condition of continued ownership of said shares of stock, and participation in any of the benefits thereof, each subscriber therefor, or transferee thereof in case of transfer, shall, as soon as the right or rights hereinafter referred to become subject to application and acquisition under the rules and regulations prescribed or to be prescribed for the purpose by congress or any executive department of the government, apply for, and in good faith comply promptly with all such rules and regulations for the acquisition of, a right to the use of water from any source of supply provided by the government, or in the provision of which the government has aided, for the irrigation of the lands to which said shares and rights represented thereby are appurtenant. Upon the failure of the subscriber, or holder otherwise, of any of the shares of the capital stock of this association to apply for such rights, or, having applied therefor, upon failure to promptly and in good faith comply with all rules and regulations prescribed or that may be prescribed by congress or by any executive department of the government relative thereto, then he shall forfeit to the association such shares of stock and all and every right in anywise theretofore or then incident thereto, or that might in anywise arise or accrue from or exist by virtue of such subscription or ownership, or that could by any means arise or be claimed therefrom, and such person, his heirs and assigns, shall thereafter have no right whatsoever as a member of this association by virtue thereof.

Sec. 4. Any shares of stock so forfeited shall at once be canceled and shall not again, under any circumstances, be renewed, revived, or reissued. Other stock in lieu thereof up to the limit of the total number of shares authorized by these articles may

be subscribed for and issued, subject to all the conditions of these articles and to the approval of the secretary of the interior.

Sec. 5. The ownership of each share of stock of this association shall carry, as incident thereto, a right to have delivered to the owner thereof water, by the association, for the irrigation of the lands to which such share is appurtenant.

Sec. 6. The amount of water so to be delivered to such owner shall be that proportionate part of all stored and developed water, the storage or development of which is or may be effected by this association, or by means of works under its control, management, or direction, or which may become available for distribution by this association from irrigation works built by the national government, during any irrigating season, as the number of shares owned by him shall bear to the whole number of valid and subsisting shares of the association issued and then outstanding, to be delivered to and upon said lands at such times during such season as he may direct.

Sec. 7. And there shall also be incident to such ownership of such shares the right to have delivered to the owner thereof, for the irrigation of said lands, as the association shall from time to time acquire means for that purpose, the water heretofore, and before the shareholder or his transferee became a member of this association, appropriated by him or by his predecessors in interest, for the irrigation of said lands: Provided, however, that the whole amount of water actually delivered from all sources shall not exceed the amount necessary for the proper cultivation of said lands.

Sec. 8. The records of the association and each and every certificate or other evidence of ownership of shares of stock in the association, when issued, shall contain a description of the lands to be irrigated, and to which the aforesaid rights and shares shall be perpetually appurtenant, and thereafter all rights, whatever their source or whatever their manner of acquisition, to the use of water for the irrigation of said lands, shall forever be inseparably appurtenant to said lands, together with the said shares of stock, and all rights and interests represented thereby or existing or accruing by reason thereof, unless such rights shall become forfeited under the provisions of these articles of incorporation, or of by-laws adopted in pursuance thereof, or by operation of law, or by the voluntary abandonment thereof by deed, grant, or other instrument, or by nonuser for the term prescribed by law; but no such abandonment shall be for the benefit of any person designated by such shareholder, directly or indirectly, or to his use, nor confer any right whatsoever upon the holder of any grant, release, waiver, or declaration of abandonment of whatever kind of such right: Provided, however, that if for any reason it should at any time become impracticable to beneficially use water for the irrigation of the land to which the right to the use of the same is appurtenant on the said land, the said right may be severed from said land and simultaneously transferred and attached to other lands to which shares of stock in this association are or are thereby made appurtenant, if a petition for leave to make such transfer and showing the necessity therefor shall have first been approved by a two-thirds vote of the board of governors at a regular meeting and by the secretary of the

interior; and all the provisions and agreements hereinbefore in this section contained shall be set forth in the aforesaid certificate or other evidence of the ownership of shares of stock in the association, and such certificate or other instrument shall be signed, executed, and acknowledged by the president and secretary of the association, and by the person to whom it is issued in the manner required by law for the execution and acknowledgment of deeds for the conveyance of real estate, and the council shall pass by-laws prescribing the form of such certificate or other instrument not inconsistent with these articles.

Sec. 9. Every transfer of the title to any lands to which the said rights and stock are so appurtenant, whether by grant or by operation of law (except where the land may be subjected by grant or involuntarily under any law to an easement, the exercise of which does not interfere with the cultivation of the soil by the servient owner) shall operate, whether it be so expressed in the grant or other means of transfer or not, as at ransfer of all rights to the use of water for the irrigation of said lands, and all rights arising from, or incident to, the ownership of such stock, and as well as the stock itself, to the grantee or successor in title of said lands; and upon presentation to this association of proof of any such transfer of land, to which such rights are appurtenant, the proper officer shall transfer such stock upon its books to the successor in title to said lands.

Sec. 10. Any transfer, or attempted transfer, of any of the shares of stock of this association, made or suffered by the owner thereof, unless simultaneously a transfer of the land to which it is appurtenant is made or suffered, shall be of no force or effect whatsoever for any purpose, and shall confer no rights of any kind whatsoever on the person or persons to whom such transfer may have been attempted to be made.

Sec. 11. No payments for the capital stock of this association shall be required except in the manner following:

Whenever it shall be announced or otherwise made known by the government, or any of its proper agencies, to the subscribers to the shares of said capital stock that rights may be initiated to the use of water from any works acquired or constructed by it for the storage or development of water capable of being used on the lands of the subscribers for said shares of stock, or in the acquisition or construction of which works the government shall have aided, then the said subscribers shall, under the rules and regulations prescribed by the government therefor, within a reasonable time, apply to the proper agency for such rights at the rate of one acre for each share of stock so subscribed for, and upon proper proof to this association that such rights have been allotted to the subscriber and that he has complied with the government rules and regulations up to that, time, so as to entitle him to complete his ultimate acquisition there of, then such subscriber shall be deemed to have paid on his subscription of said stock the amount that he shall have then paid to or for the use of the government for such right, and when all subsequent payments required by the government for such rights shall have been paid by him, or by anyone for him, then such stock shall be deemed and held to have been fully paid up.

Sec. 12. If it should be determined by the government that the amount of water that may safely be estimated to be capable

of being stored, or developed by works acquired or constructed or to be acquired or constructed by it, or by this association, in addition to the amount of water now appropriated out of Salt River and Verde River, for the irrigation of lands in said reservoir district, shall together be insufficient to properly irrigate 250,000 acres of land, then the number of shares of the capital stock of this association shall be reduced so that the number of such shares shall not exceed the number of acres estimated by the government to be capable of irrigation from such combined sources of supply.

Sec. 13. If at the time of the determination by the government of the number of acres capable of such irrigation there shall have been subscribed for a number of the shares equal to the number of acres so estimated to be capable of irrigation, then no subscription for more shares shall be taken. If the number so subscribed for, however, shall then exceed the estimated number of acres so capable of irrigation, then there shall be allotted to said subscribers that number of shares equal to the estimated number of acres capable of irrigation. In such allotment cultivated lands shall have the preference; and any excess in the number of shares subscribed for over the number so allotted shall be canceled, and thereafter shall not be issued.

Sec. 14. In exercising the right of preference to allotment of shares, provided for in the foregoing section, the by-laws may prescribe reasonable times within which such preference shall be declared and the manner thereof.

ARTICLE VI.

Section 1. The exercise of the corporate powers of this association and the management of its affairs shall be vested in—

(1) A council;

(2) A board or governors;

(3) One or more local boards of water commissioners, and

(4) A president, vice-president, treasurer, secretary, and such other officers and agents as shall or may be, from time to time, created and established by the council.

Sec. 2. The council shall consist of 30 members, who shall hold their offices for three years. In the event of a vacancy occurring from death, resignation, ceasing to be a shareholder of this association, removal from the reservoir district, or other cause, the unexpired term shall be filled at the annual election next after the vacancy shall have occurred. Shareholders of this association only shall be eligible to the office of member of the council.

Sec. 3. The annual election of the members of the council and of the other officers for whose election these articles provide shall be held on the first Tuesday of April in each year.

Sec. 4. For the purpose of electing members of the council the territory described in Article IV. of these articles shall be divided by the council into ten districts, which districts shall severally consist of contiguous territory, and be as nearly uniform in shape, and contain as nearly an equal number of acres to which shares of stock in this association are appurtenant, as may be practicable.

Sec. 5. At each annual election, after 1904, there shall be elected one member of the council from each of said several districts by the electors thereof. Such member shall at the time of his election be the owner of lands situated within the district for which he is elected to which shares of stock of this association are appurtenant, and shall also be a resident of the reservoir district, and if he should, during his term of office, cease to be such owner, or a resident of such reservoir district, his office shall thereupon, and by reason thereof, become vacant.

Sec. 6. At the annual election to be held on the first Tuesday of April, 1904, there shall be elected three members of the council from each of said districts, one of whom shall be elected to serve for one, one for two, and the third for three years.

Sec. 7. The term of office of members of the council shall begin on the first Monday in May following their election.

Sec. 8. Until the election of members of the council at the annual election in 1904, and until their qualification, the council shall consist of the following named persons, that is to say:.....

.....

Sec. 9. The council shall meet at least once in each year at the city of Phœnix, in Maricopa County, Ariz. This regular annual meeting of the council shall begin on the first Monday in May in each year and continue in session at its pleasure.

Sec. 10. Special meetings may be called and held in such manner and at such times and under such provisions as may be prescribed by the by-laws. The general object and nature of business to be transacted at any special meeting shall be made known by reasonable public notice, such notice to be that prescribed by the by-laws therefor.

Sec. 11. The members of the council shall serve as such without compensation, but may receive mileage one way at the rate of 10 cents per mile for each day of actual attendance.

Sec. 12. No member of the council shall be eligible to any office of this association to which there is attached any emolument or compensation, nor shall he be so eligible until at least two years shall have elapsed after his term of office as councilman shall have expired; provided, that this inhibition shall not apply to any person by reason of his membership of the first council.

Sec. 13. The council shall have power to enact and adopt and provide for the enforcement thereof by-laws for the government of the members of this association and the management of its business, and the conduct of its affairs, and to repeal, modify, and amend the same from time to time. But the council shall not have power to adopt or to enforce any by-laws that in anywise conflict with any rule or regulation established by the secretary of the interior or other agency of the government for the administration of water from any reservoir or other works acquired or constructed by the national government, or in the acquisition or construction of which it shall have aided, and which may be used for supplying water to the lands of the shareholders of this association.

Sec. 14. No by-laws shall be passed or enforced which shall

interfere with or affect any present existing vested right of any member of this association to the use of water for irrigation.

Sec. 15. All by-laws shall be of general application so far as general laws can be made to apply.

ARTICLE VII.

Section 1. At all elections the electors shall possess the following qualifications:

(1) Shall be at the time of the election the owner of at least one share of the capital stock of this association, and shall have been the owner thereof, as shown by the books of the association, for at least twenty days before such election.

(2) Shall be of the age of 21 years or more and of sound mind.

Sec. 2. At all elections each shareholder shall be entitled to one vote for each share of stock owned by him, not, however, to exceed in the aggregate 160 votes, and no more.

Sec. 3. The votes shall be by written or printed ballot, and be voted only by the electors at the polls in person.

Sec. 4. The council may make reasonable by-laws for the registration of voters and the method of holding elections.

Sec. 5. At all elections the person receiving the highest number of votes for any office shall be deemed elected to such office.

ARTICLE VIII.

Section 1. The board of governors shall consist of the president, by virtue of his office, and ten other members. Each of said ten members shall be the owner of lands situated within the district for which he is elected, to which shares of stock of this association are appurtenant, and shall also be a resident of the reservoir district; and if he should, during his term of office, cease to be such owner or a resident of such reservoir district, his office shall thereupon, and by reason thereof, become vacant.

Sec. 2. One member of said board shall be elected at the annual election to be held on the first Tuesday of April, 1904, and at each annual election thereafter from and by the electors of each of the districts into which the territory described in Article IV. of these articles is or may be divided for the purpose of the election of members of the council.

Sec. 3. Until the election of members of the board of governors at the annual election in 1904, and until their qualification, the board of governors shall consist of the following named persons, that is to say: .....

Sec. 4. If a member of the board of governors at any time during his term of office should cease to have any of the qualifications prescribed for that office, such office shall thereupon become vacant, and in the event of a vacancy from that cause or by reason of the death, removal from the reservoir district, or resignation of any member of said board of governors, the vacancy shall be filled by the council if it occurs more than sixty days prior to a regular election.

Sec. 5. The board of governors shall meet in regular session at the office of the association on the first Monday of each month, unless it be a legal holiday, in which case the board shall meet on the following day.

Sec. 6. Special meetings of the board of governors may be called by the president, or by any six of the members of the board. Such call shall be in writing and signed by either the president or any six of the members, and shall state the time of such proposed meeting and the nature of the business to be transacted thereat. Such written call shall be filed with the secretary, who shall thereupon immediately, and at least five days before the time fixed for such meeting, mail, postpaid, to the president and each member of the board a copy of such call, and shall publish the same in some newspaper published and of general circulation in the territory described in Article IV. of these articles on three consecutive days before and exclusive of the day fixed for such special meeting. If the secretary fail or refuse to publish such call or to mail copies thereof, as above provided, then either the president, if he issued the call, or any one of the members who issued the same, may make publication and mail copies of the call, with like effect as if done by the secretary. Special meetings of the board of governors shall be held at the office of the association.

Sec. 7. The members of the board of governors shall receive such compensation as shall be prescribed by the council by by-laws.

Sec. 8. The board of governors shall have the administration of the corporate affairs and business of the association, and shall manage and conduct the same subject to all the provisions of these articles and of the by-laws.

Sec. 9. It shall have the power to appoint, subject to removal by it at any time, a general superintendent, and prescribe his duties and powers, subject to all rules and regulations prescribed by the by-laws, and to employ an engineer or engineers and such other employees as may be proper and necessary to effect the purposes of this association, subject to such rules and regulations as may be prescribed by the by-laws.

Sec. 10. It shall have the power to prosecute, defend, and compromise all law suits; to make all contracts, in the name of the association, necessary and proper for the conduct of the affairs and the carrying on of the business of the association, subject to all limitations and regulations prescribed by these articles or the by-laws.

Sec. 11. It shall have the power to estimate, make, and levy all assessments against the shareholders of this association to the extent and in the manner authorized by these articles and regulated and prescribed by the by-laws.

Sec. 12. It shall have the power to make, publish, and enforce rules and regulations concerning the distribution, use, and application of water for irrigation, subject at all times to and not inconsistent with these articles or with the by-laws or with any rules or regulations established by the secretary of the interior or other agency of the national government.

Sec. 13. It shall keep, or cause to be kept, a record of its transactions, which shall at all times remain in the office of the

association, and shall, during office hours, be open to the inspection of the shareholders or their properly authorized agents.

Sec. 14. It shall hear and determine complaints of shareholders of nonservice or of improper service or distribution of water or of improper performance of duty by any employee of the association relative to the distribution of water.

ARTICLE IX.

Section 1. The lands under each separate distributing canal system within the territory described in Article IV. of these articles shall on the petition of the owners of two-thirds of the shares of the capital stock of this association appurtenant to the lands in such proposed canal division be formed into a canal division, and the boundaries of such division be fixed by the council. On the petition of the holders of a majority of the shares in this association owning the lands affected thereby, or without such petition, whenever in the judgment of the council it will be beneficial, the council may change or modify the boundaries of any canal division.

Sec 2. A board of water commissioners, to consist of three members, shall be appointed annually by the board of governors for each canal division. Such appointment shall be made in the month of May in each year, and no one shall be eligible for such office unless he be a resident within the canal division for which he may be appointed, and a qualified elector as provided in these articles. The term of office of the members of the boards of water commissioners shall be from the time of their appointment until the first day of May in the following year, and until their successors shall have been appointed and have qualified, and they may be removed for cause by the board of governors, who may fill any vacancy in any board of water commissioners for the unexpired term.

Sec. 3. If a petition signed by shareholders in this association, constituting a majority of qualified electors, residing in any canal division, shall be presented to the board of governors at their first meeting, in May, naming three persons eligible for appointment as water commissioners, in said canal division, and asking for their appointment to such office, such persons shall be appointed as such water commissioners.

Sec. 4. In each canal division the board of water commissioners thereof shall have the control and management of the local affairs of the canal system therein, and of the distribution of water therefrom, subject to the provisions of these articles, and to the by-laws, and to the rules and regulations established by the council, or by the secretary of the interior, or any agency of the national government.

Sec. 5. The board of water commissioners in each canal division may appoint a secretary of the board and employ a division superintendent, removable at their pleasure.

Sec. 6. The board of water commissioners may call a meeting at any time of all the landowners in their canal division who are shareholders in this association, to consider and determine whether an assessment or assessments for their special benefit should be levied on the shareholders in said division. At least

ten days' notice of such meeting shall be given by the secretary of said board, by posting a notice thereof in three public places in said canal division, and mailing a copy of such notice, with postage prepaid, to each shareholder residing in said canal division.

Sec. 7. If a majority of such shareholders who are the holders of a majority of the shares of this association appurtenant to lands in said canal division shall at said meeting approve the levy of such special assessment or assessments and sign a petition to the board of governors that the same be levied on the shareholders in this association, owning lands in said division, and specifying the amount of said proposed assessment and the purpose for which it should be levied, and said board of water commissioners should recommend it in writing, indorsed on said petition, it shall be the duty of the board of governors to levy said special assessment on all the shareholders in this association owning lands in said canal division.

Sec. 8. When so levied the said assessment may when collected be disbursed by the board of water commissioners of said canal division for the purpose specified in its levy, and shall be paid out by the treasurer on warrants drawn on him by the said board of water commissioners; provided, however, that nothing in this article shall limit or abridge the right of the association to make, levy, and collect assessments, as elsewhere in these articles provided.

ARTICLE X.

Section 1. A president and a vice-president of the association shall be elected at the annual election to be held on the first Tuesday of April, 1904, and every two years thereafter, and shall serve two years from and after the first Monday of May following their election and until their successors are elected and qualified. Until the election of a president and vice-president, as above provided, B. A. Fowler shall be the president and E. W. Wilbur shall be the vice-president of this association.

Sec. 2. A treasurer and a secretary of the association shall be appointed by the board of governors at its first regular meeting in each year, and shall serve for one year thereafter and until their successors have been appointed and have qualified.

Sec. 3. The treasurer and secretary shall give such bond as may be prescribed by the by-laws; provided that no member of the board of governors nor the secretary shall be accepted as a surety on the bond of the treasurer.

Sec. 4. The president, vice-president, treasurer, and secretary shall perform such duties as are prescribed by these articles and by the by-laws, wherein such by-laws shall not be inconsistent with law or with these articles, and shall receive such compensation as may be fixed by the by-laws, which compensation shall be neither increased nor diminished during their respective terms of office.

Sec. 5. In case of the absence, illness, or inability of the president to act from any cause, or in case of a vacancy in that office, the vice-president shall act in the place and stead of the president. In the event of a vacancy in the offices of both the

president and vice-president, the council shall call a special election to fill the unexpired terms for both offices; provided, however, that such vacancies, if occurring within sixty days before the next annual election, shall be filled by appointment by the council.

Sec. 6. The president shall be the chief executive officer of the association, and shall have general supervision over all other officers of the association in the performance of their duties as such, and of the conduct of the business and affairs of the association. He shall preside at all meetings of the board of governors and shall be ex officio a member of that board, and perform such other duties as may be devolved upon him by the by-laws.

Sec. 7. All certificates or other evidences of the ownership of shares of stock in the association issued by the association shall be signed by the president and secretary of the association and shall have the seal of the association affixed thereto.

Sec. 8. All contracts and instruments in writing executed for or in behalf of the association shall be so executed in the name of the association by the president and secretary, and shall have the seal of the association affixed thereto.

Sec. 9. The treasurer shall receive and be the custodian of all moneys and other funds of the association. No moneys shall be paid out by the treasurer unless upon warrants drawn on him by the president and secretary, except as provided in Article IX., section 8, of these articles. No warrants shall be drawn on the treasurer by the president and secretary except upon the order of the board of governors, recorded in the minutes of the board, and in a warrant record to be kept by the secretary.

Sec. 10. The treasurer shall keep a full, complete, and accurate account of all moneys of the association received and disbursed by him, in books belonging to the association, and shall present a report and account thereof for the last preceding month to the board of governors at every regular monthly meeting of said board, and shall, at the expiration of each quarter, prepare and publish, in such manner as the by-laws may prescribe, a quarterly statement to shareholders, showing all such receipts and disbursements during the last preceding quarter; and the treasurer shall perform such other duties as may be devolved upon him by the by-laws.

Sec. 11. The secretary shall act as the clerk of the board of governors, and keep a record of all their proceedings. He shall be the custodian of the seal of the association, and of all its books papers, and records. He shall immediately upon their adoption and certification to him by the council, record in a book of by-laws to be kept by him in his office, all by-laws adpoted by the council, and shall keep such book open to the inspection of any member of the association at all times during business hours. And the secretary shall perform such other duties as may be devolved upon him by the by-laws.

ARTICLE XI.

The council may create such other offices as may be necessary for the carrying on of the business and affairs of this association,

and prescribe the manner of appointment, powers, duties, terms of office, eligibility, and compensation thereof by by-laws not inconsistent with these articles.

ARTICLE XII.

Upon proper complaint thereof by the board of governors, duly sustained, the council may remove from office the president, vice-president, treasurer, secretary, or the incumbent of any office created by the council, for incompetence, neglect of duty, misappropriation of funds of the association, or for violation of any of the provisions of these articles or of any by-law. The council shall prescribe by by-laws the procedure for such removal.

ARTICLE XIII.

Section 1. Revenues necessary for the accomplishment of the purposes of this association shall be raised by an assessment thereof, from time to time as required, upon and against the shareholders.

Sec. 2. The council shall have power to make and enforce necessary by-laws for the making, levying, collecting and enforcing of such assessments.

Sec. 3. Assessments for the ordinary cost of operation, maintenance, and repair of the works of the association, or of those the maintenance and control of which are, or may be hereafter, lodged in the association, shall be equally assessed against all the shareholders in proportion to the number of shares held by them, respectively.

Sec. 4. Assessments for the purpose of constructing or acquiring, or for the betterment, improvement, renewal, replacement, or preservation of any works, property, or rights of the association, or for the purpose of preserving or increasing, or more efficiently or economically distributing the water supplies available for distribution by the association, or for the fulfillment of any obligation undertaken by the association in any contract, agreement, or other arrangement with the United States government, or necessary for the accomplishment or carrying out of any of the purposes of the association, may be equally assessed against all the shareholders in proportion to the number of shares owned by them, respectively.

Sec. 5. Assessments for expenditures for purposes that are of benefit to a part only of the shareholders may be specially assessed in proportion to such benefits against such shareholders, but no expenditure to be provided for or covered by such special assessment shall be made, or obligation to expend the same incurred, except upon the petition of the holders of two-thirds of the shares to be so specially benefited thereby.

Sec. 6. Assessments shall become, from time to time as they are made and levied, and until they are paid or otherwise discharged shall be and remain, a lien on the lands of the shareholder against which they are levied and upon the shares of stock appurtenant to said lands and all rights and interests represented by such shares. The manner of fixing the lien and enforcing the same shall be prescribed in the by-laws.

Sec. 7. Except for the ordinary operation, maintenance and repair, no work shall be undertaken, purchase made, or indebtedness incurred or be authorized during any one year whereof the cost or amount thereof shall exceed $50,000 until it shall have first been ratified by at least two-thirds of the votes cast at an election to be called for that purpose. Special elections may be called and held for such purpose under such by-laws as the council may prescribe not inconsistent with these articles.

ARTICLE XIV.

Nothing in these articles of incorporation, or in the fact of becoming a member of this association, shall be construed as affecting, or intended to affect, or in any way interfere with the present vested rights of any person to the prior use or delivery of the natural appropriated flow of the waters of the Salt and Verde rivers.

ARTICLE XV.

The individual property of the shareholders shall be exempt from liability for incorporate indebtedness of this association.

ARTICLE XVI.

The incorporate indebtedness shall not exceed two-thirds of the amount of the capital stock.

ARTICLE XVII.

This corporation shall endure for the term of twenty-five years.

ARTICLE XVIII.

These articles of incorporation can only be amended by the shareholders at a regular annual election or at a special election called for that purpose. No proposed amendment shall be submitted to the shareholders until it shall have first received the approval of two-thirds of the members of the council at a regular or duly called session thereof, nor shall any such proposed amendment be so submitted until it shall have been published in full at least once in each week for four consecutive weeks in at least three newspapers published and of general circulation within the territory described in Article IV. of these articles, the last of which such publications shall be not less than ten nor more than twenty days before any such election.

ARTICLE XIX.

This association may accept and avail itself of, or subject itself to, the provisions of any law or laws enacted or that may be enacted by congress or the legislative assembly of the territory or state, when it becomes a state, of Arizona, relative to corporations which may be applicable to corporations organized for like purposes as this association. Such acceptance or subjection shall be valid when ratified by at least two-thirds of the votes cast at any annual election, or at any special election called for the ratification thereof.

ARTICLE XX.

The seal of this association shall be a figure of two concentric circles, the outer being 2 inches and the inner 1½ inches in diameter. In the space between the two shall be the words "Salt River Valley Water Users' Association," and bearing within the center space an unrolled scroll with the words and figures thereon, "Incorporated, 1903, Arizona."

Witness our hands hereto this 4th day of February, A. D. 1903.

CHAPTER 33.

ARIZONA—CONSTITUTIONAL PROVISIONS AND STATUTES.

(a) *Constitutional Provisions.*

§ 185. The Territory of Arizona has no constitution.

(b) *Statutes.*

§ 185a. (Rev. St. '01, p. 119, par. 22) Declares water public property subject to appropriation as provided by legislature.

§ 186. (Rev. St. '01, p. 335, par. 861) Provides for appropriation being made and rights of way acquired by corporations.

§ 187. (Rev. St. '01, Appendix A, p. 1474, par. 105) Provides for the appointment of a board of water storage commissioners to investigate and ascertain the cost of reservoirs or dams, acquire rights of way, make contracts for distribution of water and do other things necessary to the construction of reservoirs and dams.

§ 188. (Rev. St. '01, Appendix A, p. 1475, par. 106) Provides for defraying the expenses of the board of water storage commissioners by a tax levy.

§ 189. (Rev. St. '01, par. 2445, sec. 2) Grants right of eminent domain for purposes mentioned in the next four sections.

§ 190. (Rev. St. '01, par. 2445, subd. 3) Canals, aqueducts, flumes, ditches, or pipes for conducting water for the use of the inhabitants of any county, incorporated city, village or town. (See §189 hereof.)

§ 191. (Rev. St. '01, par. 2445, subd. 5) Ditches, flumes and pipes for working mines. (See §189 hereof.)

§ 192. (Rev. St. '01, par. 2445, subd. 7) Reservoirs, private canals, ditches, flumes, aqueducts and pipes for conducting water for irrigation purposes. (See §189 hereof.)

§ 193. (Rev. St. '01, par. 2445, subd. 9) Reservoirs, dams, canals, ditches, flumes, tunnels, aqueducts and pipe lines used in generating electricity. (See §189 hereof.)

§ 194. (Rev. St. '01, par. 2446) Grants right to enlarge a lateral ditch upon payment of compensation.

§ 195. (Rev. St. '01, par. 2447) Defines a lateral ditch as a private ditch leading from a main ditch.

§ 196. (Rev. St. '01, par. 4168) Doctrine of riparian rights not in force.

§ 197. (Rev. St. '01, par. 4169 and p. 1484) Grants right to appropriate water, the first appropriation gives the better right.

§ 198. (Rev. St. '01, par. 4170) Requires a notice to be posted at the place of diversion, giving the amount claimed, as well as other information as to place of storage or use and the course of the ditch. Copy of notice to be filed and recorded in office of the county recorder, of which the diverting works are located and of each county through which the canal is to be constructed, also in the office of the Secretary of the Territory. Work must be commenced within a reasonable time and reasonable diligence used in construction, otherwise rights under the notice are forfeited.

§ 199. (Rev. St. '01, par. 4171, am'd by par. 142, Appendix A, p. 1484) Corporations shall not contract to deliver water in excess of capacity.

§ 200. (Rev. St. '01, par. 4172, am'd by par. 143, Appendix A, p. 1484) Ditches and canals must be kept in repair. Failure to deliver water makes company liable in damages.

§ 201. (Rev. St. '01, par. 4173) Repair of canals and ditches, persons entitled to receive water may make, if company fails. Cost is a lien on the system—notice of repairs needed must be served on the corporation six days before entering the premises to make them.

§ 202. (Rev. St. '01, par. 4174) All running water in natural streams is public, applicable to irrigation and mining.

§ 203. (Rev. St. '01, par. 4175) Established rights in acequias recognized.

§ 204. (Rev. St. '01, par. 4176) Private acequias may be constructed by owners of arable and irrigable lands.

§ 205. (Rev. St. '01, par. 4177) Damages caused by acequias through private land shall be assessed by the probate judge in summary manner.

§ 206. (Rev. St. '01, par. 4178) Right to irrigate preferable to all others. Hearings as to obstructions before justice of the peace in summary manner, and constable may be ordered to remove same.

§ 207. (Rev. St. '01, par. 4179) Provides for damages caused by erection of reduction on mining works on agricultural lands to be adjudged by three or five disinterested persons or the probate judge.

§ 208. (Rev. St. '01, par. 4180) When water appropriated for agricultural purposes is taken for mining purposes damages assessed as provided in section 207 *supra* must be paid.

§ 209. (Rev. St. '01, par. 4181) By-paths across cultivated fields prohibited penalty.

§ 210. (Rev. St. '01, par. 4182) Proprietors of arable and irrigable land shall labor on public acequia.

§ 211. (Rev. St. '01, par. 4183) Weeds on banks of canals and ditches prohibited—penalty.

§ 212. (Rev. St. '01, par. 4184) Labor on public acequia is in proportion to the amount of land held subject to irrigation.

§ 213. (Rev. St. '01, par. 4185) In repairing public water ditch, it is lawful to open private fences.

§ 214. (Rev. St. '01, par, 4186) In constructing public acequia no damages are allowed for right of way across lands of interested parties.

§ 215. (Rev. St. '01, par. 4187) Provides for the election of an overseer for public acequias.

§ 216. (Rev. St. '01, par. 4188) Provides the manner of conducting the election.

§ 217. (Rev. St. '01, par. 4189) Compensation of overseer fixed by proprietors of lands affected, and paid by them.

§ 218. (Rev. St. '01, par. 4190) Enumerates the duties of the overseer.

§ 219. (Rev. St. '01, par. 4191) In times of scarcity the oldest land titles shall have precedence.

§ 220. (Rev. St. '01, par. 4192) Duty of proprietors of lands to furnish labor required by overseer.

§ 221. (Rev. St. '01, par. 4193) Neglect of duty by overseer, liable to fine, fifty to one hundred dollars, and second conviction removal from office.

§ 222. (Rev. St. '01, par. 4194) New election to fill vacancy.

§ 223. (Rev. St. '01, par. 4195) Neglect or refusal to furnish labor, fine not exceeding ten dollars.

§ 224. (Rev. St. '01, par. 4196) Interference with acequias—fine not exceeding ten dollars.

§ 225. (Rev. St. '01, par. 4197) Fines recovered used on acequias.

§ 226. (Rev. St. '01, par. 4198) Appeals may be taken to probate court.

§ 227. (Rev. St, '01, par. 4199) Laws and customs of Sonora observed.

§ 228. (Rev. St. '01, par. 4200) Plants and trees on banks of acequias belong to owners of land.

§ 229. (Rev. St. '01, par. 4201) Private acequias may be constructed.

§ 230. (Rev. St. '01, par. 4202, am'd R. S. '01, p. 1484) Natural channels may be used to conduct water from reservoirs to place of use.

§ 231. (Rev. St. '01, par. 4203) Provides manner of distributing water from natural channels when water from reservoirs has been turned therein.

§ 232. (Rev. St. '01, par. 4204) Requires bridges across canals and ditches.

§ 233. (Rev. St. '01, par. 4206) Road overseer has supervision of crossings.

§ 234. (Rev. St. '01, par. 4207) Imposes penalty for failure to construct bridges.

(c) *Forms.*

§ 235-242. Arizona has no department of irrigation and no forms are obtainable.

CHAPTER 34.

CALIFORNIA—CONSTITUTIONAL PROVISIONS, STATUTES AND FORMS.

(a) *Constitutional Provisions.*

§ 243. Taking of Private Property—Compensation.

(Article I, sec. 14.) Private property shall not be taken or damaged for public use without just compensation having been first made to, or paid into court, for the owner, and no right of way shall be appropriated to the use of any corporation other than municipal until full compensation therefor be first made in money or ascertained and paid into court for the owner, irrespective of any benefit, from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in a court of record, as shall be prescribed by law.

§ 244. Use of Water a Public Use—Rate Fixing.

(Article XIV, sec. 1.) The use of all water now appropriated or that may hereafter be appropriated, for sale, rental or distribution, is hereby declared to be a public use, and subject to the regulation and control of the state, in the manner to be prescribed by law; provided, that the rates or compensation to be collected by any person, company, or corporation in this state for the use of water supplied to any city and county, or city or town, or the inhabitants thereof, shall be fixed, annually, by the board of supervisors, or city and county, or city or town council, or other governing body of such city and county, or city or town, by ordinance or otherwise, in the manner that other ordinances or legislative acts or resolutions are passed by such body, and shall continue in force for one year and no longer. Such ordinances or resolutions shall be passed in the month of February of each year, and take effect on the first day of July thereafter. Any board or body failing to pass the necessary ordinances or resolutions fixing water rates, where necessary, within such time, shall be subject to peremptory process to compel action at the suit of any party interested and shall be liable to such further process and penalties as the legislature may prescribe. Any person, company or corporation,

collecting water rates in any city and county, or city or town in this State, otherwise than as so established, shall forfeit the franchises and waterworks of such person, company, or corporation to the city and county, or city or town where the same are collected, for the public use .

(*b*) *Statutes.*

CIVIL CODE.

§ 245. Corporations.

Sections 548-552 of the Civil Code relate to the formation of corporations engaged in distributing water for irrigation purposes.

§ 246. Right of Purchaser to Use Water for Irrigating.

(Sec. 552.) Whenever any corporation, organized under the laws of this State, furnishes water to irrigate lands which said corporation has sold, the right to flow and use of said water is and shall remain a perpetual easement to the land so sold, at such rates and terms as may be established by said corporation in pursuance of law. And whenever any person who is cultivating land, on the line and within the flow of any ditch owned by such corporation, has been furnished water by it, with which to irrigate his land, such person shall be entitled to the continued use of said water, upon the same terms as those who have purchased their land of the corporation. [Stats. 1875-76-77.

§ 247. Community or Partnership Ditch—Repair of—Contribution.

(Sec. 842.) When two or more persons are associated by agreement in the use of a ditch, flume pipe-line or other conduit for the conveyance of water, or who are using such ditch, flume, pipe-line or other conduit, or any part thereof, for the irrigation of land, or for other lawful purpose, to the construction of which they or their grantors have contributed, he is liable to the others for the reasonable expenses of maintaining and repairing the same, and of distributing such water in proportion to the share to which he is entitled in the use of the water. [Stats. 1905, p. 600.

§ 248. Community or Partnership Ditch—Repair of—Failure to Contribute.

(Sec. 843.) If any one of them neglects, after demand in writing, to pay his proportion of such expenses, he is liable therefor in an action for contribution and in any judgment obtained against him interest from the time of such demand must be included. The action authorized by this section must be brought by any or all of the parties who have contributed more than his or their just proportion of such expenses, and may be joint or several, and therein plaintiff may recover as costs reasonable counsel fees, to be fixed by the court. [Stats. 1905, p. 600.

§ 249. Injunctions Affecting Water Rights Dissolved Upon Certain Conditions.

(Section 532, Code of Civil Procedure.) In all actions pending or which may hereafter be brought, when an injunction or restraining order has been or may be granted or applied for, to prevent the diversion pending the litigation, of water used or to be used for

irrigation or domestic purposes only, if it be made to appear to the court that great damage will be suffered by the defendant in case the injunction is continued, and that the plaintiff can be fully compensated for any damages he may suffer by reason of the continuance of the acts of the defendant during the pendency of the litigation, the court, in its discretion, may dissolve or modify the injunction, upon the defendant giving a bond, with sureties to be approved by the judge, and in such amount as may be fixed by the court or judge, conditioned that the defendant will pay all damages which the plaintiff may suffer by reason of the continuance during the litigation of the acts complained of. Upon the trial the amount of such damages shall be ascertained, and in case judgment is rendered for the plaintiff, the amount fixed as such damages shall be included in the judgment, together with reasonable attorney's fees. Upon a suit brought on the bond the amount of damages as fixed in said judgment shall be conclusive upon the sureties. [March 11, 1872, Amending Stat. 1887, p. 241.

CIVIL CODE—DIVISION SECOND, TITLE VIII, WATER RIGHTS.

§ 250. Rights to Water May be Acquired by Appropriation.

(Sec. 1410.) The right to the use of running water flowing in a river or stream, or down a canon or ravine, may be acquired by appropriation. [March 21, 1872.

§ 251. Appropriation Must be for a Useful Purpose.

(Sec. 1411.) The appropriation must be for some useful or beneficial purpose, and when the appropriator or his successor in interest ceases to use it for such a purpose, the right ceases. [March 21, 1872.

§ 252. Point of Diversion May be Changed.

(Sec. 1412.) The person entitled to the use may change the place of diversion, if others are not injured by such change, and may extend the ditch, flume, pipe or aqueduct by which the diversion is made to places beyond that where the first use was made. [March 21, 1872.

§ 253. Water May be Turned Into Natural Channels.

(Sec. 1413.) The water appropriated may be turned into the channel of another stream and mingled with its water, and then reclaimed; but in reclaiming it the water already appropriated by another must not be diminished. [March 21, 1872.

§ 254. First in Time, First in Right.

(Sec. 1414.) As between appropriators, the one first in time is the first in right. [March 21, 1872.

§ 255. Notice of Appropriation.

(Sec. 1415.) A person desiring to appropriate water must post a notice in writing, in a conspicuous place at the point of intended diversion, stating therein:

1. That he claims the water there flowing to the extent of (giving the number) inches measured under a four-inch pressure.

2. The purposes for which he claims it, and the place of intended use.

3. The means by which he intends to divert it, and the size of the flume, ditch, pipe or aqueduct in which he intends to divert it.

A copy of the notice must, within ten days after it is posted, be recorded in the office of the recorder of the county in which it is posted.

After filing such copy for record, the place of intended diversion or the place of intended use or the means by which it is intended to divert the water, may be changed by the person posting said notice or his assigns, if others are not injured by such change. This provision applies to notices already filed as well as to notices hereafter filed. [March 21, 1872. Am'd Stat. 1903, p. 361.

§ 256. Work on Water Rights.

(Sec. 1416.) Within sixty days after the notice is posted, the claimant must commence the excavation or construction of the works in which he intends to divert the water, or the survey, road or trial building, necessarily incident thereto, and must prosecute the work diligently and uninterruptedly to completion, unless temporarily interrupted by snows or rain; provided, that if the erection of a dam has been recommended by the California debris commission at or near the place where it is intended to divert the water the claimant shall have sixty days after the completion of such dam in which to commence the excavation or construction of the works in which he intends to divert the water. [March 21, 1872. Am'd Stat. 1895, p. 70; Stat. 1903, p. 396.

§ 257. Completion Defined.

(Sec. 1417.) By "completion" is meant conducting the waters to the place of intended use. [March 21, 1872.

§ 258. Doctrine of Relation Applied.

(Sec. 1418.) By a compliance with the above rules the claimant's right to the use of the water relates back to the time the notice was posted. [March 21, 1872.

§ 259. Forfeiture.

(Sec. 1419.) A failure to comply with such rules deprives the claimants of the right to the use of the water as against a subsequent claimant who complies therewith. [March 21, 1872.

§ 260. Rights of Present Claimant.

(Sec. 1420.) Persons who have heretofore claimed the right to water, and who have not constructed works in which to divert it, and who have not diverted nor applied it to some useful purpose, must, after this title takes effect, and within twenty days thereafter, proceed as in this title provided, or their right ceases. [March 21, 1872.

§ 261. Recorder to Keep Book in which to Record Notices.

(Sec. 1421.) The recorder of each county must keep a book in which he must record the notices provided for in this title. [March 21, 1872.

§ 262. Ditch in National Park or Reservation—Begin Work When.

(Sec. 1422.) If the place of intended diversion or any part of the route of intended conveyance of water so claimed, be within

and a part of, any national park, forest reservation or other public reservation, and be so shown in the notice of appropriation of said water, then the claimant shall have sixty days, after the grant of authority to occupy and use such park or reservation for such intended purpose, within which to commence the excavation or construction of said works; provided, that within sixty days after the posting of said notice of appropriation, as provided in section 1415 of the Civil Code, the claimant shall in good faith commence (and thereafter diligently and continuously, except when temporarily interrupted by snow or rain, prosecute to completion) such surveys and other works as under the regulations governing such park or reservations, may be required as preliminary to, or for use with, an application for such authority; and, provided also, that the claimant shall in good faith on completion of said survey and preliminary work, apply to the officer, board, or body, having charge of such park or reservation, for such authority, and shall thereafter prosecute said application with reasonable diligence. [March 21, 1872. Rep. 1887, 114. Re-enacted 1903, p. 397.

TITLE IX, HYDRAULIC MINING.

§ 263. Where Hydraulic Mining Can be Carried On.

(Sec. 1424.) The business of hydraulic mining may be carried on within the State of California wherever and whenever the same can be carried on without material injury to the navigable streams, or the lands adjacent thereto. [Stats. 1893, p. 337.

§ 264. Meaning of Hydraulic Mining.

(Sec. 1425.) Hydraulic mining, within the meaning of this title, is mining by means of the application of water, under pressure, through a nozzle, against a natural bank. [Stats. 1893, 337.

§ 265. Water Commissioners for Certain Counties—Waste of Water from Artesian Wells — Co-operation with Federal Government—Penal Code.

By an Act in 1854 (Stat. '54, p. 76; amended by Stat. '62, p. 234) water commissioners for certain specified counties were appointed.

Waste of water from artesian wells is prohibited by the Act of 1877. [Stat. '77-'78, p. 195.

Co-operation by the state of California with the federal government under the "Reclamation Act," provided it does not interfere with the water already appropriated or in reservoirs, or now in use for irrigation or domestic purposes under the state laws, is provided for by the Act of 1895. [Stat. '95, p. 152.

Sections 347, 374, 420, 499, 592, 607, 629, of the Penal Code relate to offenses in connection with water and water rights.

An Act for the protection of the owners of ditches and flumes. [Stat. '89, p. 202, §§1-5.

§ 266. Co-tenants in Use of Ditch or Flume—Maintenance—Expense of.

(Sec. 1.) When two or more persons are associated by agreement in the use of a ditch or flume, or are using for the irrigation of land a ditch or flume, to the construction of which

they or their grantors have contributed, each of them shall be liable to the other for the reasonable expense of maintaining and repairing the same in proportion to the share in the use of the water to which he is entitled.

§ 267. Maintenance—Expense of—Failure to Pay.

(Sec. 2.) If any of them refuse or neglect, after demand in writing, to pay his proportion of such expenses, he shall be liable therefor in an action for contribution in the nature of an action on the case, and in any judgment obtained against him, interest from the time of such demand at the rate of two per cent. per month may be included.

§ 268. Division of Water—Taking More Than Entitled To—Penalty.

(Sec. 3.) If any of them wilfully appropriate to his own use more than his proportionate share of the water from such ditch or flume, to the detriment of his associates, or any of them, he shall be liable in damages in treble the value of the water so appropriated in excess of his proper share.

§ 269. Actions—By Whom Brought.

(Sec. 4.) The actions provided for in sections 2 and 3 may be brought by any or either of the parties injured, and may be joint or several.

§ 270. Enactment.

(Sec. 5.) This act shall take effect from and after its passage.

IRRIGATION DISTRICTS—"WRIGHT ACT."

L. 1897, pp. 254-394, as Amended.

§ 271. Proposal for—Who May Make.

(Sec. 1.) A majority in the number of the holders of title, or evidence of title, to lands susceptible of irrigation from a common source and by the same system of works, such holders of title, or evidence of title, representing a majority in value of said lands, according to the equalized county assessment roll or rolls for the year last preceding, may propose the organization of an irrigation district, under the provisions of this act. Said equalized assessment roll or rolls shall be sufficient evidence of title for the purposes of this act.

§ 272. Petition to the Board of Supervisors.

(Sec. 2.) Same as Colo., §§2-3; *post*, §§517-518.

§ 273. Hearing of Testimony.

(Sec. 3.) Same as Colo., §3; *post*, §518.

§ 274. Appeal from Board to Court.

(Sec. 4.) The right of appeal from said order to the superior court of the county where said petition is heard is hereby given to any person interested who is a party to the record: provided, that if more than one appeal be taken they shall be consolidated and tried together. Such appeal shall be taken within ten days after the entry of such order upon the minutes of the board of

supervisors. The appeal shall be taken and heard in the same manner as appeals from justices' courts to the superior court, except as herein otherwise provided. Upon the appeal, the superior court may make and enter its judgment affirming, modifying or reversing the order appealed from. Within ten days thereafter the superior court must cause its remittitur to issue to said board of supervisors, and if said order of the board of supervisors is modified or reversed, the judgment of the superior court and its remittitur shall direct the board of supervisors what order it shall enter. Such remittitur shall be filed by the clerk of the board of supervisors. and at the first regular meeting of the board thereafter, it shall cause to be entered in its minutes the order as directed by said superior court. The appeal herein provided for shall be heard and determined within thirty days from the time of filing the notice of appeal.

§ 275. Hearing Before Board—Order Dividing District.

(Sec. 5.) If, on said final hearing, the boundaries of the proposed district are defined and established, said board shall make an order dividing said district into five divisions, as nearly equal in size as may be practicable, which shall be numbered first, second, third, fourth and fifth, and one director shall be elected for each division by the electors thereof; provided, that if so requested in said petition, the board may order that there shall be only three divisions in said district, and that only three directors be elected, or that they be elected for the district at large.

§ 276. Election on Organization.

(Sec. 6.) See Colo., § 5; *post*, §520.

§ 277. Officers to be Elected.

(Sec. 7.) See Colo., §5; *post*, §520.

§ 278. Qualifications of Electors.

(Sec. 8.) See Colo., §5; *post*, §520.

§ 279. Canvass of Votes.

(Sec. 9.) Same as Colo., §5; *post*, §520, excepting that the California act requires a two-thirds majority.

§ 280. Order to be Filed with County Recorder.

(Sec. 10.) See Colo., §5; *post*, §520.

§ 281. Election—Contest of.

(Sec. 11.) Such election on organization may be contested by any person owning property within the proposed district liable to assessment. The directors elected at such election shall be made parties defendant. Such contest shall be brought in the superior court of the county where the petition for organization is filed; provided, that if more than one contest be pending they shall be consolidated and tried together. The court having jurisdiction shall speedily try such contest, and determine, upon the hearing, whether the election was fairly conducted and in substantial compliance with the requirements of this act, and enter its judgment accordingly. Such contest must be brought within twenty days after the canvass of the vote and declaration of the result by the board of supervisors. The right of appeal is hereby given to either

party to the record within thirty days from entry of judgment. The appeal must be heard and determined by the supreme court within sixty days from the time of filing the notice of appeal.

§ 282. Tenure of Office.

(Sec. 12.) See Colo., §5; *post*, §520.

§ 283. Duties and Powers of the Board of Directors.

(Sec. 13.) The directors of any district created after the passage of this act, on the first Tuesday after their election, after they shall have qualified, shall meet and classify themselves by lot into two classes, as nearly equal in number as possible, and the term of office of the class having the greater number shall expire at the next general February election in this act provided for; and the term of office of the class having the lesser number shall terminate at the next general February election thereafter. After such classification, said directors shall organize as a board, shall elect a president from their number, and appoint a secretary, who shall each hold office during the pleasure of the board. The salary of the secretary and the amount of the bond to be given by him for the faithful performance of his duties shall be fixed by the board of directors.

§ 284. Monthly Meetings.

(Sec. 14.) See Colo., §12; *post*, §527, except meetings are monthly.

§ 285. Board Make Contracts—Acquire Property—By-laws.

(Sec. 15.) The board shall have the power, and it shall be their duty, to manage and conduct the business and affairs of the district; make and execute all necessary contracts; employ and appoint such agents, officers and employees as may be required, and prescribe their duties. The board and its agents and employees shall have the right to enter upon any land to make surveys and may locate the necessary irrigation works and the line for any canal or canals, and the necessary branches for the same, on any lands which may be deemed best for such location. Said board shall also have the right to acquire, either by purchase or condemnation, or other legal means, all lands, and waters, and water rights and other property necessary for the construction, use, supply, maintenance, repair, and improvements of said canal or canals and works, including canals and works constructed and being constructed by private owners, lands for reservoirs for the storage of needful waters, and all necessary appurtenances. But no purchase of any waters, or water rights, or canals, or reservoirs, or reservoir sites, or irrigation works, or other real property of any nature or kind, for any price in excess of ten thousand dollars shall be final or binding on the district, nor shall the purchase price thereof, be paid until a petition of a majority of the holders of title, or evidence of title, to lands within the district, such holders of title, or evidence of title, representing a majority in value of said land, according to the last equalized assessment roll of the district, shall have been filed with the board and an order of the board made thereon confirming such purchase. Said board may also construct the necessary dams. reservoirs and works for the collection of water for said district, and do any and every lawful act necessary to be done, that sufficient water may be furnished to each land owner in said

district for irrigation purposes. The said board is hereby authorized and empowered to take conveyances or other assurances for all property acquired by it under the provisions of this act, in the name of such irrigation district, to and for the uses and purposes herein expressed, and to institute and maintain any and all actions and proceedings, suits at law or in equity, necessary or proper in order to fully carry out the provisions of this act, or to enforce, maintain, protect, or preserve any and all rights, privileges and immunities created by this act, or acquired in pursuance thereof, and in all courts, actions, suits or proceedings the said board may sue, appear and defend in person or by attorneys, and in the name of such irrigation district. It shall be the duty of said board to establish equitable by-laws, rules and regulations for the distribution and use of water among the owners of said lands, which must be printed in convenient form for distribution in the district. Said board shall have power generally to perform all such acts as shall be necessary to fully carry out the purposes of this act.

§ 286. Election Precincts—Change of Boundaries of—Leasing Canal Systems.

(Sec. 1.) There is hereby added to the provisions of an act entitled, "An Act to provide for the organization and government of irrigation districts, and to provide for the acquisition or construction thereby of works for the irrigation of the lands embraced within such districts, and also to provide for the distribution of water for irrigation purposes," approved March 31st, 1897, a new section, to be numbered 15½, and to read as follows:

(Sec. 15½.) The board of directors, when they deem it advisable for the best interests of the district, and the convenience of the electors thereof, may at any time, but not less than sixty days before an election to be held in the district, change the boundaries of the divisions and election precincts of the district; provided, such changes shall be made to keep each division as nearly equal in area and population as may be practicable. Such change of boundaries of the divisions must be shown on the minutes of the board. The board of directors of any irrigation district now or that may hereafter be organized in this state, shall also have the power and such board is hereby vested with authority, to lease the system of canals and works in the district, whenever such leasing may be for the benefit of the district; provided, that when the directors of any irrigation district contemplate the leasing of the canals or works of such district, they shall give notice of such contemplation by publishing the same in some newspaper published in the county in which said irrigation district lies, at least three weeks prior to the making of any lease, and such lease shall be made to the highest bidder. But such board shall have the right to reject any and all bids. Such lease shall in no way interfere with any rights that may have been established by law at the time such lease is made; and, further provided, that the board of directors shall require a good and sufficient bond to secure the faithful performance of the lease by the lessees.

§ 287. Condemnation—In Whose Name.

(Sec. 16.) In case of condemnation proceedings the board shall proceed, in the name of the district, under the provisions of Title VII, part 3 of the Code of Civil Procedure.

§ 288. Water—Use of a Public Use.

(Sec. 17.) The use of all water required for the irrigation of the lands of any district formed under the provisions of this act, or the act of which this is supplementary or amendatory, together with the rights of way for canals and ditches, sites for reservoirs, and all other property required in fully carrying out the provisions of this act, is hereby declared to be a public use, subject to the regulation and control of the state, in the manner prescribed by law.

§ 289. Distribution of Water—Method of.

(Sec. 18.) It is hereby expressly provided that all waters distributed for irrigation purposes shall be apportioned ratably to each land owner upon the basis of the ratio which the last assessment of such owner for district purposes within said district bears to the whole sum assessed upon the district; provided, that any land owner may assign the right to the whole or any portion of the waters so apportioned to him.

§ 290. Officers—Election of—Bonds—Amount of—Record of.

(Sec. 19.) An election shall be held in each irrigation district on the first Wednesday in February, 1899, and on the first Wednesday in February in each second year, thereafter at which an assessor, a collector and a treasurer, and directors for the district shall be elected. The person receiving the highest number of votes for any office to be filled at such election shall be elected thereto. The assessor, collector and treasurer shall each hold office from the first Tuesday in March next after, for two years, and until his successor is elected and qualified. Within ten days after receiving their certificates of election, hereinafter provided for, said officers shall take and subscribe the official oath and file the same in the office of the board of directors, and execute the bond hereinafter provided for. The assessor shall execute an official bond in the sum of five thousand dollars, and the collector an official bond in the sum of twenty thousand dollars, and the district treasurer an official bond in the sum of fifty thousand dollars; each of said bonds to be approved by the board of directors; provided, that the board of directors may, if it shall be deemed advisable, fix the bonds of the treasurer and collector, respectively, to suit the coindtions of the district, the maximum amount of the treasurer's bond not to exceed fifty thousand dollars, and the miminum amount thereof not to be less than ten thousand dollars; and the maximum amount of the collector's bond not to exceed twenty thousand dollars, and the minimum amount thereof not to be less than five thousand dollars. Each member of said board of directors shall execute an official bond in the sum of five thousand dollars, which said bonds shall be approved by the judge of the superior court of said county where such organization was effected, and shall be recorded in the office of the county recorder thereof, and filed with the secretary of said board. All official bonds herein provided for shall be in the form prescribed by law for the official bonds of county officers.

§ 291. Organization of Board of Directors.

(Sec. 20.) See Colo., §6; *post*, §521.

§ 292. Notice of Elections.

(Sec. 21.) See Colo., §7; *post*, §522.

§ 293. Powers and Duties of Election Officers.

(Sec. 22.) See Colo., §8; *post*, §523.

§ 294. Elections—Conduct of—Certificate of Election—Contents of.

(Sec. 23.) Voting may commence as soon as the polls are opened, and may be continued during all the time the polls remain opened, and shall be conducted, as nearly as practicable, in accordance with the provisions of the general election laws of this state. As soon as all the votes are counted, a certificate shall be drawn up on each of the papers containing the poll list and tallies, or attached thereto, stating the number of votes each one voted for has received, and designating the office to fill which he was voted for, which number shall be written in figures and in words at full length. Each certificate shall be signed by the clerk, judge and the inspector. One of said certificates, with the poll list and the tally paper to which it is attached, shall be retained by the inspector, and preserved by him a least six months. The ballots shall be strung upon a cord or thread by the inspector, during the counting thereof, in the order in which they are entered upon the tally list by the clerks; and said ballots, together with the other of said certificates, with the poll list and tally paper to which it is attached, shall be sealed by the inspector in the presence of the judges and clerks, and indorsed, "Election returns of (naming the precinct) precinct," and be directed to the secretary of the board of directors, and shall be immediately delivered by the inspector or by some other safe and responsible carrier designated by said inspector to said secretary, and the ballots shall be kept unopened for a least six months, and if any person be of the opinion that the vote of any precinct has not been correctly counted, he may appear on the day appointed for the board of directors to open and canvass the returns, and demand a recount of the vote of the precinct that is so claimed to have been incorrectly counted.

§ 295. Canvass of Votes.

(Sec. 24.) See Colo., §9; *post*, §524.

§ 296. Vacancies—How Filled.

(Sec. 25.) In case of a vacancy in the office of assessor, collector or treasurer, the vacancy shall be filled by appointment of the board of directors; provided, that if said board of directors shall neglect or refuse to make such appointment within a period of forty days, then the board of supervisors of the county wherein the office of said board of directors is situated shall make such appointment. In case of a vacancy in the office of director, the vacancy shall be filled by appointment by the board of supervisors of the county where the office of such board of directors is situated, from the division in which the vacancy occurred. An officer appointed as above provided shall hold his office until the next regular election for said district, and until his successor is elected and qualified.

§ 297. Directors—Qualifications of.

(Sec. 26.) A director shall be a resident and freeholder of the irrigation district, but not necessarily of the division for which he is elected.

§ 298. Offices—Consolidation of.

(Sec. 27.) The board of directors may, in its discretion, consolidate any two or more of the offices of assessor, collector and treasurer. The order of consolidation must be made at least thirty days prior to general election of the district, and shall take effect at the next succeeding election; provided, that the board of directors may, at least thirty days before a general election of the district, where the offices have been consolidated, segregate the same, each office to be filled at such election.

§ 299. Directors—Number of—Change of.

(Sec. 28.) In any district the board of directors thereof may, upon the presentation of a petition therefor, by a majority of the holders of title, or evidence of title, of said district, evidenced as above provided, order that on and after the next ensuing general election for the district, there shall be either three or five directors, as said board may order, and they shall be elected by the district at large, or by divisions, as so petitioned and ordered; and after such order such directors shall be so elected.

§ 300. Title to Property.

(Sec 29.) Same as §13, Act of Colo.; *post*, §528, except that California does not mention taxation, and omits what follows the word "provided" in the Colo. act.

§ 301. Issuance of Bonds.

(Sec. 30.) Same as §15, Act of Colo.; *post*, §530, except as to manner and time of payment and rate of interest.

§ 302. Bonds—Payment of—Contents of.

(Sec. 31.) All bonds issued under the provisions of this act shall be payable in gold coin of the United States, in ten series, as follows, to wit: At the expiration of twenty-one years, five per cent of the whole number of said bonds; at the expiration of twenty-two years, six per cent; at the expiration of twenty-three years, seven per cent; at the expiration of twenty-four years, eight per cent; at the expiration of twenty-five years, nine per cent; at the expiration of twenty-six years, ten per cent; at the expiration of twenty-seven years, eleven per cent; at the expiration of twenty-eight years, thirteen per cent; at the expiration of twenty-nine years, fifteen per cent, and at the expiration of thirty years, sixteen per cent; that the several enumerated percentages being of the entire amount of the bond issue, but each bond must be made payable at a given time for its entire amount and not for a percentage. Said bonds shall bear interest at the rate of five per cent per annum, payable semi-annually, on the first day of January and July of each year. The principal and interest shall be payable at the place designated therein. Said bonds shall be each of the denomination of not less than one hundred dollars nor more than five hundred dollars; shall be negotiable in form, signed by the president and secretary, and the seal of the board of directors shall

be affixed thereto. Each issue shall be numbered consecutively, and bear date at the time of their issue. Coupons for the interest shall be attached to each bond, signed by the secretary. Said bonds shall express on their face that they were issued by authority of this act, stating its title and date of approval, and shall also so state the number of the issue of which said bonds are a part. The secretary shall keep a record of the bonds sold, their number, the date of sale, the price received and the name of the purchaser.

§ 303. Board May Sell Bonds.

(Sec. 32.) Same as §16, Colo. Act; *post*, §531, except place of publication of notices and Cal. Act requires bonds to be sold at not less than par.

§ 304. Shall be Paid by Annual Assessment.

(Sec. 33.) See Colo., §17; *post*, §532.

§ 305. Assessment in Case Proceeds of Bonds Not Sufficient.

(Sec. 34.) In case the money raised by the sale of bonds issued be insufficient or in case the bonds be unavailable for the completion of the plan of canal and works adopted, and additional bonds be not voted, it shall be the duty of the board of directors to provide for the completion of said plan by levy of assessments therefor; provided, however, that such levy of assessments shall not be made except first an estimate of the amount required for such purposes had been made by said board, and the question as to the making of said levy submitted to a vote of electors of the district. Before such question is submitted the order of submission shall be entered in the minutes of the board, stating the amount to be levied and the purpose therefor, and if submitted at a special election said order shall, in addition, fix the day of election. Notice of such election must be given by posting notices in three public places in each election precinct in said district for at least twenty days, and also by publication of such notice in some newspaper published in the county where the office of the board of directors of such district is required to be kept, once a week for at least three successive weeks. Such notices must specify the time of holding the election, and the amount of assessment proposed to be levied. Said election must be held and the result thereof determined and declared in all respects as nearly as practicable in conformity with the provisions of this act governing the election of officers; provided, that no informalities in conducting such an election shall invalidate the same, if the election shall have been otherwise fairly conducted. At such election the ballots shall contain the words "Assessment—Yes," or "Assessment—No," or words equivalent thereto. If a majority of the votes cast are "Assessment—Yes," the board of directors shall cause an assessment in the amount named in the order of submission to be levied; if a majority of the votes cast are "Assessment—No," the result of such election shall be so declared and entered of record.

§ 306. Assessor—Duty of.

(Sec. 35.) The assessor must, between the first Monday in March and the first Monday in June, in each year, assess all real property in the district, to the persons who own, claim, have the possession, or control thereof, at its full cash value. He must pre-

pare an assessment book, with appropriate headings, in which must be listed all such property within the district, in which must be specified, in separate columns, under the appropriate head: (*a*) the name of the person to whom the property is assessed (if the name is not known to the assessor, the property shall be assessed to "unknown owners"); (*b*) land by township, range, section or fractional section, and when such land is not a congressional division or subdivision, by metes and bounds, or other description sufficient to identify it, giving an estimate of the number of acres, locality and the improvements thereon; (*c*) city and town lots, naming the system of numbering in such city or town, and the improvements thereon; (*d*) the cash value of real estate, other than city or town lots; (*e*) the cash value of improvements on such real estate; (*f*) the cash value of the city and town lots; (*g*) the cash value of improvements on city and town lots; (*h*) the cash value of improvements on real estate assessed to persons other than the owners of the real estate; (*i*) the total value of all property assessed; (*j*) the total value of all property after equalization by the board of directors; (*k*) such other things as the board of directors may require. Any property which may have escaped the payment of any assessment for any year, shall, in addition to the assessment for the then current year, be assessed for such year with the same effect and with the same penalties as are provided for such current year.

§ 307. Assessor—May Have Deputies.

(Sec. 36.) The board of diectors must allow the assessor as many deputies, to be appointed by him to complete the assessment within the time herein prescribed. The board must fix the compensation of such deputies, which shall be paid out of the treasury of the district. The compensation must not exceed five dollars per day for each deputy, for the time actually engaged, nor must any allowance be made but for work done between the first Monday in March and the first Monday in August in each year.

§ 308. Assessment—When Completed—Equalization of.

(Sec. 37.) On or before the first Monday in August in each year, the assessor must complete his assessment book and deliver it to the secretary of the board, who must immediately give notice thereof, and of the time the board of directors, acting as a board of equalization, will meet to equalize assessments, by publication in a newspaper published in each of the counties comprising the district, The time fixed for the meeting shall not be less than twenty nor more than thirty days from the first publication of the notice; and in the meantime the assessment book must remain in the office of the secretary for the inspection of all persons interested.

§ 309. Board of Equalization—Meetings of.

(Sec. 38.) Upon the day specified in the notice required by the preceding section for the meeting, the board of directors, which is hereby constituted a board of equalization for that purpose, shall meet and continue in session from time to time as long as may be necessary, not to exceed ten days, exclusive of Sundays, to hear and determine such objections to the valuation and assessment as may come before them; and the board may change the valuation as may be just. The secretary of the board shall be present during

its session, and note all changes made in the valuation of property, and in the names of the persons whose property is assessed and within ten days after the close of the session he shall have the total values, as finally equalized by the board, extended into columns and added.

§ 310. Levy—How Made.

(Sec. 39.) The board of directors shall then levy an assessment sufficient to raise the annual interest on the outstanding bonds, and in any year in which any bonds shall fall due must increase said assessment to an amount sufficient to raise a sum sufficient to pay the principal of the outstanding bonds as they mature. The secretary of the board must compute and enter in a separate column of the assessment book the respective sums, in dollars and cents, to be paid as an assessment on the property therein enumerated. When collected, the assessment shall be paid into the district treasury and be apportioned to the several proper funds.

In case of the neglect or refusal of the board of directors to cause such assessments and levies to be made as in this act provided, then the assessment of property made by the county assessor and the state board of equalization shall be adopted, and shall be the basis of assessment for the district, and the board of supervisors of the county in which the office of the board of directors is situated shall cause an assessment roll for said district to be prepared, and shall make the levy required by this act, in the same manner and with like effect as if the same had been made by said board of directors, and all expenses incident thereto shall be borne by such district. In case of the neglect or refusal of the collector or treasurer of the district to perform the duties imposed by law, then the tax collector and treasurer of the county in which the office of the board of directors is situated must, respectively, perform such duties, and shall be accountable therefor upon their official bonds as in other cases.

§ 311. Assessment—Lien on Real Property.

(Sec. 40.) The assessment upon real property is a lien against the property assessed from and after the first Monday in March for any year, and the lien for the bonds of any issue shall be a preferred lien to that for any subsequent issue, and such lien is not removed until the assessments are paid, or the property sold for the payment thereof.

§ 312. Collector—Duties of.

(Sec. 41.) On or before the first day of November, the secretary must deliver the assessment book to the collector of the district, who shall within twenty days publish a notice, in a newspaper published in each county, in which any portion of the district may lie, that said assessments are due and payable and will become delinquent at six o'clock P. M. on the last Monday of December next thereafter, and that unless paid prior thereto five per cent will be added to the amount thereof, and also the time and place at which payment of assessments may be made, which notice shall be published for the period of two weeks. The collector must attend at the time and place specified in the notice, to receive assessments, which must be paid in gold and silver coin; he must mark the date

of payment of any assessment in the assessment book, opposite the name of the person paying and give a receipt to such person, specifying the amount of the assessment and the amount paid, with a description of the property assessed. On the last Monday in December, at six o'clock P. M., of each year, all unpaid assessments are delinquent, and thereafter the collector must collect thereon, for the use of the district, an addition of five per cent.

§ 313. Assessment—Delinquent List—Publication of.

(Sec. 42.) On or before the first day of February the collector must publish the delinquent list, which must contain the names of the persons and a description of the property delinquent, and the amount of the assessments and costs due opposite each name and description. He must append to and publish with the delinquent list a notice, that unless the assessments delinquent, together with the costs and percentage, are paid, the real property upon which such assessments are a lien will be sold at public auction. The publication must be made once a week for three successive weeks, in a newspaper published in the county in which the property delinquent is situated; provided, that if any property assessed to the same person or corporation shall lie in more than one county, then such publication may be made in any county in which any portion of such property may lie. The publication must designate the time and place of sale. The time of sale must not be less than twenty-one nor more than twenty-eight days from the first publication, and the place must be at some point designated by the collector, within the district; provided, however, that if there should occur any error in the publication of the sale of the delinquent property, which might invalidate a sale thereunder, the collector shall at once republish the sale of the property affected by such error, making such republication conform to the provisions of this law, and the time of sale designated in such republication must not be less than twenty-one nor more than twenty-eight days from the first republication and the place of sale must be at some point designated by the collector within the district, and stated in such republication.

§ 314. Delinquent Assessments—Collection of—Penalties.

(Sec. 43.) The collector must collect, in addition to the assessments due on the delinquent list and five per cent added, fifty cents on each lot, piece or tract of land separately assessed. On the day fixed for the sale, or some subsequent day to which he may have postponed it, of which he must give notice, the collector, between the hours of ten A. M. and three o'clock P. M., must commence the sale of the property advertised, commencing at the head of the list and continuing alphabetically, or in the numerical order of the lots or blocks, until completed. He may postpone the day of commencing the sales, or the sale, from day to day, but sale must be completed within three weeks from the day first fixed; provided, that if any sale or sales shall be stayed by legal proceedings is not part of the time limited for making such sales or sale; and provided, further, that in any district where the validity of any assessment shall be in litigation at the time this act shall take effect, the sale of any property, whether it be involved in such litigation or not may be postponed for a time not to exceed four months.

§ 315. Delinquent Assessment—Sale of Property for—Owner Specify.

(Sec. 44.) The owner or person in possession of any real estate offered for sale for assessments due thereon may designate, in writing to the collector, prior to the sale, what portion of the property he wishes sold, if less than the whole, but if the owner or possessor does not, then the collector may designate it and the person who will take the least quantity of the land, or in case an undivided interest is assessed, then the smallest portion of the interest and pay the assessment and costs due, including two dollars for the duplicate certificate of sale, is the purchaser. If the purchaser does not pay the assessments and costs before ten o'clock A. M. the following day, the property on the next sale day must be resold for the assessments and costs. But in case there is no purchaser in good faith for the same on the first day that the property is offered for sale, then, when the property is offered thereafter for sale, and there is no purchaser in good faith for the same, the whole amount of the property assessed shall be struck off to the irrigation district within which such lands are situated as the purchaser, and the duplicate certificate delivered to the treasurer of the district, and filed by him in his office. No charge shall be made for the duplicate certificate delivered to the treasurer of the district, and filed by him in his office. No charge shall be made for the duplicate certificate where the district is the purchaser and in such case the collector shall make an entry, "Sold to the district," and he shall be credited with the amount thereof in his settlement. An irrigation district as a purchaser at such sale, shall be entitled to the same rights as a private purchaser, and the title so acquired by the district, subject to the right of redemption herein provided may be conveyed by deed, executed and acknowledged by the president and secretary of said board; provided, that authority to so convey must be conferred by resolution of the board entered on its minutes, fixing the price at which such sale may be made, and such conveyance shall not be made for a less sum than the reasonable market value of such property.

§ 316. Certificate of Sale—Contents.

(Sec. 45.) After receiving the amount of assessments and costs, the collector must make out in duplicate a certificate dated on the day of sale, stating (when known) the name of the person assessed, a description of the land sold, the amount paid therefor, that it was sold for assessments, giving the amount and year of the assessment, and specifying the time when the purchaser will be entitled to a deed. The certificate must be signed by the collector, and one copy delivered to the purchaser, and the other filed in the office of the county recorder of the county in which the land is situated.

§ 317. Certificate of Sale—Record of.

(Sec. 46.) The collector, before delivering any certificate, must in a book enter a description of the land sold, corresponding with the description in the certificate, the date of the sale, purchasers' names, and amount paid, regularly number the description on the margin of the book, and put a corresponding number on each certificate. Such book must be open to public inspection, without fee, during office hours, when not in actual use. On filing

the certificate with such county recorder, the lien of the assessments vests with the purchaser, and is only divested by the payment to him, or to the collector for his use, of the purchase money and two per cent per month from the day of sale until redemption.

§ 318. Redemption from Sale—When and How Made—Deeds.

(Sec. 47.) A redemption of the property sold may be made by the owner, or any party in interest within twelve months from the date of purchase; provided, that all land heretofore sold at delinquent tax sale under any of the provisions of an act, entitled "An Act to provide for the organization and government of irrigation districts, and to provide for the acquisition of water and other property, and for the distribution of water thereby for irrigation purposes," approved March 7, 1887, or the acts supplementary thereto or amendatory thereof, where deeds have not been made and delivered, or when such deed has been made to the district, and the district has not disposed of the same, may be redeemed at any time within six months from January 27, 1897. Redemption must be made in gold or silver coin, as provided for the collection of state and county taxes, and when made to the collector he must credit the amount paid to the person named in the certificate, and pay it, on demand, to the person or his assignees. In each report the collector makes to the board of directors he must name the person entitled to redemption money, and the amount due each. On receiving the certificate of sale the county recorder must file it and make an entry in a book similar to that required of the collector. On the presentation of the receipt of the person named in the certificate, or of the collector for his use, of the total amount of the redemption money, the recorder must mark the word "redeemed" the date, and by whom redeemed, on the certificate and on the margin of the book where the entry of the certificate is made. If the property is not redeemed within the time herein provided, the collector, or his successor in office, must make to the purchaser, or his assignee, a deed of the property, reciting in the deed substantially the matters contained in the certificate, and that no person redeemed the property during the time allowed by law for its redemption. The collector shall receive from the purchaser, for the use of the district, two dollars for making such deed.

§ 319. Deeds—Recitals of.

(Sec. 48.) The matter recited in the certificate of sale must be recited in the deed, and such deed duly acknowledged or proved as prima facie evidence that: (*a*) The property was assessed as required by law; (*b*) the property was equalized as required by law; (*c*) that the assessments were levied in accordance with law; (*d*) the assessments were not paid; (*e*) at a proper time and place the property was sold as prescribed by law, and by the proper officer; (*f*) the property was not redeemed; (*g*) the person who executed the deed was the proper officer.

Such deed duly acknowledged or proved is (except as against actual fraud) conclusive evidence of the regularity of all the proceedings from the assessment by the assessor, inclusive, up to the execution of the deed. The deed conveys to the grantee the absolute title to the lands described therein free of all incumbrances, except when the land is owned by the United States, or this state, in which case it is prima facie evidence of the right of possession.

§ 320. Assessment—Evidence of.

(Sec. 49.) The assessment book or delinquent list, or a copy thereof, certified by the collector, showing unpaid assessments against any person, or property, is prima facie evidence of the assessment, the property assessed, the delinquency, the amount of assessments due and unpaid, and that all the forms of the law in relation to the assessment and levy of such assessments have been complied with.

§ 321. Land Sold for Assessment—Misnomer of Owner—Does Not Affect Deed.

(Sec. 50.) When land is sold for assessments correctly imposed as the property of a particular person, no misnomer of the owner, or supposed owner, or other mistake relating to the ownership thereof, affects the sale, or renders it void or voidable.

§ 322. Collector—Settlements of.

(Sec. 51.) On the first Monday in each month, the collector must settle with the secretary of the board for all moneys collected for assessments, and pay the same over to the treasurer; and within six days thereafter he must deliver to and file in the office of the secretary a statement under oath, showing: (*a*) An account of all his transactions and receipts since his last settlement; (*b*) that all money collected by him as collector has been paid. The collector shall also file in the office of the secretary, on said first Monday in each month, the receipt of the treasurer for the money so paid.

§ 323. Bonds—Payment of Interest Coupons—Payment of Portion of—How Made.

(Sec. 52.) Upon the presentation of the coupons due, to the treasurer, he shall pay the same from the bond fund. Whenever said fund shall amount to the sum of ten thousand dollars in excess of an amount sufficient to meet the interest coupons due, the board of directors may direct the treasurer to pay such an amount of said bonds now due as the money in said fund will redeem, at the lowest value at which they may be offered for liquidation, after advertising in the manner hereinbefore provided for the sale of bonds, for sealed proposals for the redemption of said bonds. Said proposals shall be open by the board in open meeting, at a time to be named in the notice, and the lowest value at which they may be offered for liquidation, after advertising in the manner hereinbefore provided for the sale of bonds, for sealed proposals for the redemption of said bonds. Said proposals shall be opened by the board in open meeting, at a time to be named in the notice, and the lowest bid for said bonds must be accepted; provided, that no bond shall be redeemed at a rate above par. In case the bids are equal, the lowest numbered bond shall have the preference. In case none of the holders of said bonds shall desire to have the same redeemed, as herein provided for, said money shall be invested by the treasurer, under the direction of the board, in United States bonds, or the bonds of the state, which shall be kept in said "bond fund" and may be used to redeem said district bonds whenever the holders thereof may desire.

§ 324. Construction of Works.

(Sec. 53.) Same as §23, Act of Colo., *post*, §538, except that contractors' bond must be for twenty-five per cent of the contract price.

§ 325. Claims—Payment of—Funds—Excess of, Deposited with County Treasurer.

(Sec. 54.) No claim shall be paid by the treasurer until allowed by the board, and only upon a warrant signed by the president, and countersigned by the secretary; provided, that the board may draw, from time to time, from the construction fund, and deposit in the county treasury of the county where the office of the board is situated, any sum in excess of the sum of twenty-five thousand dollars. The county treasurer of said county is hereby authorized and required to receive and receipt for the same, and place the same to the credit of said district, and he shall be responsible upon his official bond for the safe-keeping and disbursement of the same, as in this act provided. He shall pay out the same, or any portion thereof to the treasurer of the district only, and only upon the order of the board, signed by the president, and attested by the secretary. The said county treasurer shall report, in writing on the second Monday in each month, the amount of money in the county treasury, the amount of receipts for the month preceding, and the amount or amounts paid out; said report shall be verified and filed with the secretary of the board. The district treasurer shall also report to the board, in writing, on the first Monday in each month, the amount of money in the district treasury, the amount of receipts for the month preceding, and the amount of items of expenditures, and said report shall be verified and filed with the secretary of the board.

§ 326. Cost of Property—Salary of Officers—How Paid.

(Sec. 55.) The cost and expense of purchasing and acquiring property and constructing the works and improvements herein provided for, shall be wholly paid out of the construction fund. For the purpose of defraying the expenses of the organization of the district, and of the care, operation, management, repair and improvement of such portions of said canal and works as are completed and in use, including salaries of officers and employees, the board may in lieu (either in part or in whole) of levying assessments as herein provided for, fix rates of tolls and charges, and collect the same from all persons using said canal for irrigation and other purposes.

§ 327. Bridges, Crossing Streams and Railways.

(Sec. 56.) The board of directors shall have the power to construct the said works across any stream of water, water course, street, avenue, highway, railway, canal, ditch or flume which the route of said canal or canals may intersect or cross, in such manner as to afford security for life and property; but said board shall restore the same, when so crossed or intersected, to its former state as near as may be, or in a sufficient manner not to have impaired unnecessarily its usefulness; and every company whose railroad shall be intersected or crossed by said works shall unite with said board in forming said intersections and crossings, and grant the

privileges aforesaid; and if such railroad company and said board or the owners and controllers of the said property, thing, or franchise so to be crossed, cannot agree upon the amount to be paid therefor, or the points or the manner of said crossings or intersections, the same shall be ascertained and determined in all respects as is herein provided in respect to the taking of land. The right of way is hereby given, dedicated, and set apart, to locate, construct and maintain said works over and through any of the lands which are now or may be the property of this state; and also there is given, dedicated and set apart, for the uses and purposes aforesaid, all waters and water rights belonging to this state within the district.

§ 328. Compensation of Directors.

(Sec. 57.) Same as §27, Act of Colo.; *post*, §542, except compensation is $3.00 per day.

§ 329. Directors Not to be Interested in Contracts.

(Sec. 58.) See Colo., §27; *post*, §542.

§ 330. Special Election—Purpose of—How Called.

(Sec. 59.) The board of directors may, at any time, when in their judgment it may be deemed advisable, call a special election and submit to the qualified electors of the district the question, whether or not a special assessment shall be levied for the purpose of raising money to be applied to any of the purposes provided in this act. Such election must be called upon the notice prescribed, and the same shall be held and the result thereof determined and declared in all respects in conformity with the provisions of section 30 of this act. The notice must specify the amount of money proposed to be raised and the purpose for which it is intended to be used. At such elections the ballots shall contain the words "Assessment—Yes," or "Assessment—No." If two-thirds or more of the votes cast are "Assessment—Yes" the board shall, at the time of the annual levy hereunder, levy an assessment sufficient to raise the amount voted.

§ 331. Rate of Assessment—How Ascertained.

(Sec. 60.) The rate of assessments levied under the provisions of this act shall be ascertained by deducting fifteen per cent for anticipated delinquencies from the aggregate assessed value of the property in the district as it appears on the assessment roll for the current year, and then dividing the sum voted by the remainder of such aggregate assessed value. The assessments so levied shall be computed and entered on the assessment roll by the secretary of the board, and collected at the same time and in the same manner as other assessments provided for herein; and when collected shall be paid into the district treasury for the purposes specified in the notice of such special election.

§ 332. Shortage of Water—Rotation.

(Sec. 62.) In case the volume of water in any stream or river shall not be sufficient to supply the continual wants of the entire country through which it passes, and susceptible of irrigation therefrom, then it shall be the duty of the water commissioners, constituted as hereinafter provided, to apportion, in a just and

equitable proportion, a certain amount of said water upon certain or alternate weekly days to different localities, as they may, in their judgment, think best for the interest of all parties concerned, and with due regard to the legal and equitable rights of all. Said water commissioner shall consist of the chairman of the board of directors of each of the districts affected.

§ 333. Water Flowing in Ditches—Amount of.

(Sec. 63.) It shall be the duty of the board of directors to keep the water flowing through the ditches under their control to the full capacity of such ditches in times of high water.

§ 334. Vested Rights and Navigation Protected.

(Sec. 64.) Navigation shall never in anywise be impaired by the operation of this act, nor shall any vested interest in or to any mining water rights or ditches, or in or to any water or water rights, or reservoirs or dams now used by the owners or possessors thereof in connection with any mining industry, or by persons purchasing or renting the use thereof, or in or to any other property now used, directly or indirectly, in carrying on or promoting the mining industry, ever be affected by or taken under its provisions, save and except that rights of way may be acquired over the same.

§ 335. Diversion of Water—Compensation Ascertained and Paid.

(Sec. 65.) Nothing herein contained shall be deemed to authorize any person or persons to divert the waters of any river, creek, stream, canal, or ditch from its channel, to the detriment of any person or persons having any interest in such river, creek, stream, canal or ditch, or the waters therein, unless previous compensation be ascertained and paid therefor, under the laws of this state authorizing the taking of private property for public uses.

§ 336. Taxation—Property of District Exempt.

(Sec. 66.) The rights of way, ditches, flumes, pipe-lines, dams, water rights, reservoirs and other property of like character, belonging to any irrigation district, shall not be taxed for state and county or municipal purposes.

§ 337. Funds—Creation of.

(Sec. 67.) The following funds are hereby created and established, to which the moneys properly belonging shall be apportioned, to wit: Bond fund, construction fund, general fund.

§ 338. Bonds—Validity of—Confirmation Proceedings—Brought by Board.

(Sec. 68.) The board of directors may, at any time after the issue of any bonds or the levy of any assessment herein provided, for, bring an action in the superior court of the county wherein is located the office of such board, to determine the validity of any such bonds, or such levy of assessments; such actions shall be in the nature of a proceeding in rem, and jurisdiction of all parties interested may be had by publication of summons for at least once a week for three weeks in some paper of general circulation published in the county where the action is pending, such paper to be

designated by the court having jurisdiction of the proceedings. Jurisdiction shall be complete within ten days after the full publication of such summons in the manner herein provided. Any one interested may at any time before the expiration of said ten days appear and by proper proceedings contest the validity of such bonds or assessments. Such action shall be speedily tried and judgment rendered declaring such matter so contested either valid or invalid. Either party may have the right to appeal to the supreme court at any time within thirty days after the rendition of such judgment, when appeal must be heard and determined within three months from the time of taking such appeal.

§ 339. Confirmation Proceedings—Begun by Individual, When.

(Sec. 69.) If no such proceeding shall have been brought by the board of directors, then, at any time within thirty days after the levy of any assessment or issue of any bonds under the provisions of this act, any district assessment-payer may bring an action in the superior court of the county where the office of the board of directors is located, to determine the validity of any such assessment or such bonds. The board of directors shall be made parties defendant, and service of summons shall be made on the members of the board personally. Said board shall have the right to appear and contest such action. Such action shall be speedily tried, with the right of appeal to either party, within the time and manner herein provided for the bringing of actions by the board to determine such matters. Such appeal shall be heard and determined in the manner and within the time therein provided.

§ 340. Confirmation Proceedings—Consolidation of Actions.

(Sec. 70.) If more than one action shall be pending at the same time concerning similar contests in this act provided for, they shall be consolidated and tried together.

§ 341. Confirmation Proceedings—Court Procedure—Pleading and Practice.

(Sec. 71.) The court hearing any of the contests herein provided for, in inquiring into the regularity, legality or correctness of such proceedings, must disregard any error, irregularity or omission which does not affect the substantial rights of the parties to said action or proceeding. The rules of pleading and practice provided by the Code of Civil Procedure, which are not inconsistent with the provisions of this act, are applicable to all actions or proceedings herein provided for. The motion for a new trial of any such action or proceeding must be heard and determined within ten days from the filing of the notice of intention. The costs on any hearing or contest herein provided for, may be allowed and apportioned between the parties, or taxed to the losing party, in the discretion of the court.

§ 342. Contests—Limitation of.

(Sec. 72.) No contest of any thing or matter herein provided shall be made other than within the time and manner herein specified.

§ 343. Officers—Violation of Duty—Penalty.

(Sec. 73.) For any willful violation of any express duty herein provided for, on the part of any officer herein named, he shall be

liable upon his official bond, and be subject to removal from office, by proceedings brought to the superior court of the county wherein the office of the board of directors of the district is located, by any assessment-payer of the district.

§ 344. Exclusion of Lands.

(Sec. 74.) See Colo., §41; *post*, §556.

§ 345. Petition for Exclusion.

(Sec. 75.) See Colo., §42; *post*, §557.

§ 346. Petition—Notice.

(Sec. 76.) See Colo., §43; *post*, §558.

§ 347. Petition—Hearing.

(Sec. 77.) See Colo., §44; *post*, §559.

§ 348. Exclusion of Lands—Order of Board.

(Sec. 78 Amended.) Sec. 1. Section 78 of an act, entitled "An Act to provide for the organization and government of irrigation districts, and to provide for the acquisition or construction thereby of works for the irrigation of the lands embraced within such districts, and also, to provide for the distribution of water for irrigation purposes," approved March 31, 1897, is hereby amended so as to read as follows:

Section 78. If, upon the hearing of any such petition, no evidence or proofs in support thereof be introduced, or if the evidence fail to sustain said petition, or if the board deem it not for the best interests of the district that the lands, or some portion thereof, mentioned in the petition, should be excluded from the district, the board shall order that said petition be denied as to such lands; but if the said board deem it for the best interest of the district that the lands mentioned in the petition, or some portion thereof, be excluded from the district, and if no person interested in the district show cause in writing, why the said lands, or some portion thereof, should not be excluded from the district, or if, having shown cause, withdraws the same, or upon the hearing fails to establish such objections as he may have made, then it shall be the duty of the board to, and it shall forthwith make an order that the lands mentioned and described in the petition, or some defined portion thereof, be excluded from said district; provided, that it shall be the duty of said board to so order, upon petition therefor as aforesaid, that all lands so petitioned to be excluded from said district shall be excluded therefrom which cannot be irrigated from, or which are not susceptible to, or would not, by reason of being permanently devoted to uses other than agricultural, horticultural, viticultural or grazing, be directly benefited by the actual irrigation of the same from a common source, or by the same system of works with the other lands of said district, or from the source selected, chosen or provided, or the system adopted for the irrigation of the lands of said district, or which are already irrigated or entitled to be irrigated, from another source or by another system of irrigation works.

Section 2. This act shall take effect immediately.

§ 349. Exclusion of Lands—Consent of Bondholders.

(Sec. 79.) If there be outstanding bonds of the district at the time of the filing of said petition, the holders of such outstanding bonds may give their assent, in writing, to the effect that they severally consent that the lands mentioned in the petition, or such portion thereof as may be excluded from said district by order of said board, or the decree of the superior court as hereinafter provided, may be excluded from the district; and if said lands, or any portion thereof, be thereafter excluded from the district, the lands so excluded shall have the same force and effect as evidence as the acknowledgment of such conveyance. The assent shall be filed with the board, and must be recorded in the minutes of the board; and said minutes, or a copy thereof, certified by the secretary of said board, shall be admissible in evidence, with the same effect as the said assent, and such certified copy thereof may be recorded in the office of the county recorder of the county wherein said lands are situated.

§ 350. Order—Record—Effect.

(Sec. 80.) See Colo., §46; *post*, §561.

§ 351. Exclusion of Lands—Affecting Division—Office of Director Become Vacant.

(Sec. 81.) If the lands excluded from any district under this act shall embrace the greater portion of any division or divisions of such district, then the office of director for such division or divisions shall become and be vacant at the expiration of ten days from the final order of the board excluding said lands; and such vacancy or vacancies shall be filled by appointment by the board of supervisors of the county where the office of such board is situated, from the district at large. A director appointed as above provided, shall hold his office until the next regular election for said district, and until his successor is elected and qualified.

§ 352. Division of Districts.

(Sec. 82.) See Colo., §47; *post*, §562.

§ 353. Guardian, Executor or Administrator Sign Petition.

(Sec. 83.) A guardian and executor, or an administrator of an estate, who is appointed as such under the laws of this state, and who, as such guardian, executor, or administrator, is entitled to the possession of the lands belonging to the estate which he represents, may, on behalf of his ward, or the estate which he represents, upon being thereto properly authorized by the proper court, sign and acknowledge the petition in this act mentioned, and may show cause, as in this act provided, why the boundaries of the district should not be changed.

§ 354. Lands Excluded Liable for Outstanding Indebtedness—When.

(Sec. 84.) Nothing in this act provided shall, in any manner, operate to release any of the lands so excluded from the district from any obligation to pay, or any lien thereon, of any valid outstanding bonds or otherindebtedness of said district at the time of the filing of said petition for the exclusion of said lands, but upon the contrary, said lands shall be held subject to said lien, and

answerable and chargeable for and with the payment and discharge of all of said outstanding obligations at the time of the filing of the petition for the exclusion of said land, as fully as though said petition for such exclusion were never filed and said order or decree of exclusion never made; and for the purpose of discharging such outstanding indebtedness, said lands so excluded shall be deemed and considered as part, of said irrigation district the same as though said petition for its exclusion had never been filed or said order or decree of exclusion never made; and all provisions which may have been resorted to to compel the payment by said lands of its quota or portion of said outstanding obligations, had said exclusion never been accomplished, may, notwithstanding said exclusion, be resorted to to compel and enforce the payment on the part of said lands of its quota and portion of said outstanding obligations of said irrigation district for which it is liable, as herein provided. But said land so excluded shall not be held answerable or chargeable for any obligation of any nature or kind whatever, incurred after the filing with the board of directors of said district; provided that the provisions of this section shall not apply to any outstanding bonds, the holders of which have assented to the exclusion of such lands from said district, as hereinbefore provided.

§ 355. Boundaries—Change of.

(Sec. 85.) See Colo., §31; *post*, §546.

§ 356. Contiguous Territory—Annexation—Petition.

(Sec. 86.) See Colo., §32; *post*, §547.

§ 357. Contiguous Territory—Notice.

(Sec. 87.) See Colo., §33; *post*, §548.

§ 358. Contiguous Territory—Hearing.

(Sec. 88.) See Colo., §34; *post*, §549.

§ 359. Payment.

(Sec. 89.) See Colo., §35; *post*, §550.

§ 360. Boundaries—Orders.

(Sec. 90.) Same as Colo., §36; *post*, §551, except the proviso in the Colo. Act.

§ 361. Boundaries—Change of—Order of Board.

(Sec. 91.) If any person interested in said district, or the proposed change of its boundaries, shall show cause as aforesaid why such boundaries should not be changed, and shall not withdraw the same, and if the board of directors deem it for the best interests of the district that the boundaries thereof be so changed as to include therein the lands mentioned in the petition, or some part thereof, the board shall adopt a resolution to that effect. The resolution shall describe the exterior boundaries of the lands which the board are of the opinion should be included within the boundaries of the district when changed.

§ 362. Boundaries—Change of—Question Submitted at an Election.

(Sec. 92.) Upon the adoption of the resolution mentioned in the last preceding section, the board shall order that an election

be held within said district, to determine whether the boundaries of the district shall be changed as mentioned in said resolution; and shall fix the time at which such election shall be held, and cause notice thereof to be given and published. Such notice shall be given and published, and such election shall be held and conducted and returns thereof shall be made and canvassed, and the result of the election ascertained and declared, and all things pertaining thereto conducted in the manner prescribed by said act in case of a special election to determine whether bonds of an irrigation district shall be issued. The ballots cast at said election shall contain the words, "For change of boundary," or "Against change of boundary," or words equivalent thereto. The notice of election shall describe the proposed change of the boundaries in such manner and terms that it can readily be traced.

§ 363. Boundaries—Change of—Election Results.

(Sec. 93.) If at such election a majority of all the votes cast at said election shall be against such change of the boundaries of the district, the board shall order that said petition be denied, and shall proceed no further in that matter. But if a majority of such votes be in favor of such change of the boundaries of the district, the board shall thereupon order that the boundaries be changed in accordance with said resolution adopted by the board. The said order shall describe the entire boundaries of said district, and for that purpose the board may cause a survey of such portions thereof to be made as the board may deem necessary.

§ 364. Order—Record—Effect.

(Sec. 94.) See Colo., §37; *post*, §552.

§ 365. Records—Evidence.

(Sec. 95.) See Colo., §38; *post*, §553.

§ 366. Legal Representatives Petitioners.

(Sec. 96.) See Colo., §39; *post*, §554.

§ 367. Redivision of District—Election of Officers.

(Sec. 97.) See Colo., §40; *post*, §555.

§ 368. Bonded Indebtedness—Reduction of—Election.

(Sec. 98.) Whenever the board of directors of an irrigation district heretofore organized, or hereafter organized under the provisions of this act, shall determine that the authorized bonded indebtedness of such irrigation district is greater than such district is liable to need to complete its system as planned, and there be no outstanding bonds, the board of directors may call a special election for the purpose of voting upon a proposition to reduce such bonded indebtedness to such sum as the board may determine to be sufficient for such purpose.

§ 369. Reduction of Bonded Indebtedness—Notice of Election—Ballot.

(Sec. 99.) Notice of the said election shall be given in the same manner as provided in section 30 of said act, in relation to calling special elections for issuance of bonds. The notice of election must state the amount of the authorized bonded indebted-

ness of such district, and the amount to which it is proposed to reduce the same; also the date on which said election will be held, and the polling places as established by said board of directors. The ballots cast at said election shall contain the words "For reducing bonds—Yes," or "For reducing bonds—No." When the vote is canvassed by the board of directors, they shall only be empowered to issue or sell such amount of bonds as was stipulated in the said notice of such special election; but if a majority of said votes are not "For reducing bonds—Yes," then the authority to issue bonds shall remain the same as before said special election was held.

§ 370. Reduction of Bonded Indebtedness—Assent of Bondholders.

(Sec. 99½.) In case there be outstanding bonds of any district desiring to take advantage of the provisions of this act concerning reduction of bonded indebtedness, the assent of such bondholders may be obtained to such reduction of the bonded indebtedness, in the same manner as provided in section 79 of this act. If such assent is obtained in the manner therein provided, then, and in that event, such district shall be empowered to take advantage of all the provisions of this act, but not otherwise. No reduction of the bonded indebtedness, as in this act provided, shall in any manner affect any order of court that may have been made, adjudicating and confirming the validity of said bonds.

§ 371. Water—Use of for Mechanical Purposes—Lease of.

(Sec. 100.) Whenever any irrigation district, heretofore organized or hereafter organized under the provisions of this act, in the development of its works as by law provided, may have opportunity, without increased expenditure, to utilize the water by it owned or controlled, for mechanical purposes not inconsistent with the provisions of said act, the board of directors may lease the same, as in this act hereinafter provided.

§ 372. Water—Lease of—Resolution—Publication of Call for Bids.

(Sec. 101.) Whenever the board of directiors may desire to lease the use of water, as hereinbefore stated, they shall pass a resolution of intention to so lease the same. Immediately thereafter the secretary shall cause notice of such intention to be given by publication in one newspaper published in each county in which lands of the district are situated, for at least twenty days (provided, a newspaper is published therein), otherwise in any newspaper the board of directors may select. And if the board thinks proper in such other newspapers as may be deemed advisable, calling for bids for the leasing of said water for the purposes hereinbefore mentioned. Said notice shall state that the board will receive sealed proposals therefor, that the lease will be let to the highest responsible bidder, stating the time and place of opening said proposals.

§ 373. Bids—Opening—Action Upon.

(Sec. 102.) At the time and place appointed the board shall proceed to open the proposals in public. As soon thereafter as may be convenient the board shall let said lease in portions, or as a whole, to the highest responsible bidder, or they may reject any or all bids, and readvertise for proposals for the same.

§ 374. Water—Lease of—Payment of Rental.

(Sec. 103.) The rental upon said lease may vary from year to year, as shall be specified in said lease, and shall be payable semi-annually, on the 13th day of December and 13th day of June of each year. All moneys collected as in this act provided, shall be paid into the treasury, and be apportioned to such funds as may be deemed advisable.

§ 375. Lease—Term of.

(Sec. 104.) The board shall have power, as in this act provided, to execute a lease for any period not exceeding twenty-five years. If at any time the rental shall not be paid on the days hereinbefore mentioned, the amount of such rental then due shall be doubled, and if not paid within ninety days thereafter the said lease shall be forfeited to said district together with any and all works constructed, owned, used or controlled by said lessee.

§ 376. Lease—Bond of Lessee.

(Sec. 105.) Upon the letting of any lease, as in this act provided, the board may require the lessee to execute a bond for the faithful performance of the covenants of said lease, or give such other evidence of good faith, as in their judgment may be necessary.

§ 377. Bonds Unsold—Destruction of—Election to Determine.

(Sec. 106.) Whenever there remains in the hands of the board of directors of any irrigation district heretofore organized, or organized under the provisions of this act, after the completion of its ditch system, and the payment of all demands against such district any bonds voted to be issued by said district, but not sold, and not necessary to be sold for the raising of funds for the use of such district, said board of directors may call a special election for the purpose of voting upon a proposition to destroy said unsold bonds or so many of them as may be deemed best, or may submit such proposition at a general election.

§ 378. Election—Notice of—What Contain—Ballots.

(Sec. 107.) Such election shall be held in the same manner as other elections held under the provisions of this act. A notice of such election shall be given in the same manner as provided in section 30 of this act in relation to calling special elections for the issuance of bonds. The notice of election must state the amount of the bonded indebtedness of such district authorized by the vote of the district, the amount of the bonds remaining unsold, and the amount proposed to be destroyed, and the date on which such election is proposed to be held, and the polling places as fixed by the board of directors. The ballots to be cast at such election shall contain the words "For destroying bonds—Yes," and "For destroying bonds—No," and the voter must erase the word "No" in case he favors the destruction of the bonds, and otherwise the word "Yes."

§ 379. Canvass of Votes—Destruction of Bonds.

(Sec. 108.) When the vote is canvassed by the board of directors and entered of record, if a two-thirds majority of the votes cast should be found to be in favor of the destruction of said

bonds, then the president of the board, in the presence of a majority of the members of the board, must destroy the bonds so voted to be destroyed; and the total amount of bonds so destroyed and cancelled shall be deducted from the sum authorized to be issued by the electors of said district, and no part thereof shall thereafter be reprinted or reissued.

§ 380. Organized Districts Not Affected by this Act—When.

(Sec. 109.) Nothing in this act shall be so construed as to affect the validity of any district heretofore organized under the laws of this state, or its rights in or to property, or any of its rights or privileges of whatsoever kind or nature, but said districts are hereby made subject to the provisions of this act so far as applicable; nor shall it affect, impair, or discharge any contract, obligation, lien or charge, for or upon which it was or might become liable or chargeable had not this act been passed; nor shall it affect the validity of any bonds which may have been issued but not sold; nor shall it affect any action which now may be pending.

§ 381. Repeal—Saving Clause.

(Sec. 110.) Nothing in this act shall be construed as repealing or in anywise modifying the provisions of any other act relating to the subject of irrigation or water commissioners except such as may be contained in an act, entitled "An Act to provide for the organization and government of irrigation districts, and to provide for the acquisition of water and other property, and for the distribution of water thereby for irrigation purposes," approved March 7, 1887, and the subsequent acts supplementary thereto, and amendatory thereof all of which acts so far as they may be inconsistent herewith are hereby repealed.

(c) *Forms.*

§ 382-3. Notice of Appropriation.

NOTICE.

Azusa, August 27, 1883.

To Whom It May Concern:

We, the undersigned, hereby claim the water here flowing in the channel of the San Gabriel river, to the extent of 5,000 inches measured under a four-inch pressure, and the purpose for which the same is claimed is for irrigation and domestic use on lands in Azusa township and the county of Los Angeles, state of California, and owned by the stockholders of the Azusa Water Development and Irrigating Company.

The means by which it is intended to divert said water is by bedrock and surface dam, or both, tunnel, ditch, iron pipe, and flume, or any or either of such means as may be found most practicable, and the size of such tunnel will be six feet in height and six feet in width, and the size of such ditch to be eight feet in width and five feet in depth. The size of such iron pipe to be forty inches in diameter, and the size of such flume is six feet six inches in width, and six feet and six inches in depth, or larger, if necessary, to carry the amount of water here claimed.

Such bedrock and surface dam, or either of them, to be con-

structed of rock, cement, logs, brush and gravel, or either of them, or any of such material, or any other material found as well or better suited for the purpose of such construction.

AZUSA WATER DEVELOPMENT AND IRRIGATING COMPANY.

By M. Baldridge, *Pres.*

Vineland Irr. Dist. v. Azusa Irr. Co., 126 Cal. 482, 58 p. 1057 (—). The foregoing form is given by Wiel in "Water Rights in the Western States," p. 413.

CHAPTER 35.

COLORADO—CONSTITUTIONAL PROVISIONS, STATUTES, AND FORMS.

(a) *Constitutional Provisions.*

ARTICLE X.

REVENUE.

§ 384. Ditches Not Taxed.

(Sec. 3) Ditches, canals and flumes owned and used by individuals or corporations, for irrigating land owned by such individuals or corporations, or the individuals (individual) members thereof, shall not be separately taxed so long as they shall be owned and (used) exclusively for such purposes.

ARTICLE XVI.

MINING AND IRRIGATION.

§ 385. Water, Public Property.

The water of every natural stream, not heretofore appropriated, within the state of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the state, subject to appropriation as hereinafter provided. (Art. 16, §5.)

§ 386. Diverting Unappropriated Water—Priority.

The right to divert unappropriated waters of any natural stream for beneficial uses shall never be denied. Priority of appropriation shall be given the better right as between those using the water for the same purpose; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall have the preference over those claiming for any other purpose, and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes. (Art. 16, §6.)

§ 387. Right of Way for Ditches, Flumes.

All persons and corporations shall have the right of way across public, private and corporate lands for the construction of ditches, canals and flumes, for the purpose of conveying water for domestic purposes, for the irrigation of agricultural lands, and for mining and manufacturing purposes, and for drainage, upon payment of just compensation. (Art. 16, §7.)

§ 388. County Commissioners Fix Rates for Water.

The general assembly shall provide by law that the board of county commissioners, in their respective counties, shall have power, when application is made to them by either party interested, to establish reasonable maximum rates to be charged for the use of water, whether furnished by individuals or corporations. (Art. 16, §8.)

(b) Statutes.

§ 389. Artesian Wells.

A large number of appropriations for artesian wells to be located at different points have been made in Colorado from the internal improvement permanent fund or the internal improvement income fund. These several acts may be found in 1 Mills' Ann. St., §§162-168 and 3 *Id.*, §§168*a*-168*s* 1.

[Ch. 29, "Conveyances," 3 Mills' Ann. St.]

§ 390. (427a) Conveyance of Water Rights.

In the conveyance of water rights hereafter made in this state in all cases except where the ownership of stock in ditch companies or other companies constitute the ownership of a water right, the same formalities shall be observed and complied with as in the conveyance of real estate. [L. 93, p. 298, §1.

WATER USERS' ASSOCIATION.

An Act concerning water users' associations organized under the reclamation act of congress of June 17th, 1902.—*Approved April* 10, 1905, L. '05, p. 360, Ch. 141, to be §§491*s* and 491*t* of next ed. of 3 Mills' Ann. St.

§ 391. (§1) Exempt from Taxation.

That any water users' association which is organized in conformity with the requirements of the United States, under the reclamation act of June 17, 1902, and which, under its articles of incorporation, is authorized to furnish water only to its stockholders, shall be exempt from the payment of any income tax and from the payment of any annual franchise tax, but shall be required to pay, as preliminary to its incorporation, only a fee of twenty dollars ($20.00) for the filing and recording of its articles of incorporation and the issuance of certificate of incorporation.

§ 392. (§2) Stock Subscriptions—Record.

That any water users' association organized in conformity with the requirements of the United States, under the reclamation act of June 17, 1902, may, with the consent of the county

commissioners, furnish the clerk and recorder of any county in Colorado, a book, or books, containing printed copies of its articles of incorporation, and forms of subscription for stock, and the county clerk and recorder to whom such book or books shall be furnished, shall use the same for recording the stock subscriptions in such association, and the charges for the recording thereof shall be made on the basis of the number of words actually written therein.

§ 393. (§3) All acts or parts of acts inconsistent herewith are hereby repealed. [L. '05, p. 361, §2.
[Ch. 30, "Corporations," 1 and 3 Mills' Ann. Stat.]

CORPORATIONS.

§ 394. (567) Ditch, Reservoir or Pipe Lines.

When any three or more persons associate under the provisions of this chapter to form a corporation for the purpose of constructing a ditch, reservoir, pipe line, or any thereof, for the purpose of conveying water from any natural or artificial stream, channel or source whatever, to any mines, mills or lands, or storing the same, they shall in their certificate, in addition to the matters required in section 2 of this chapter, specify as follows, viz: The stream, channel or source from which the water is to be taken, the point or place at or near which the water is to be taken out, the location as near as may be, of any reservoir intended to be constructed, the line as near as may be, of any ditch or pipe line intended to be constructed, and the use when the water is intended to be applied. [L. '91, p. 97, §1.]

§ 395. (567a) Ditch and Reservoir Companies—Extended Term of Incorporation.

When the term of years for which any corporation which has been, or may hereafter be, incorporated as a ditch company for the purpose of carrying water for irrigation purposes, or, as a reservoir company for the storage of water for irrigation purposes, has expired, or is about to expire by lawful limitation, and such corporation has not been administered upon as an expired corporation or gone into liquidation and settlement and division of its affairs, it may have its term of incorporation extended and continued, the same as if originally incorporated, as hereinafter provided. [L. '91, p. 96, §1.]

§ 396. (567b) Extension of Corporate Life of Ditch and Reservoir Companies.

Whenever the corporate life of any such ditch or reservoir company has expired or is about to expire, as aforesaid, the stockholders of such company may vote upon the question of extending the life of such corporation for another twenty years, or less, by first giving notice of such intention, by publication, for two successive weeks, in the newspaper printed nearest the place where the principal operations of said company are carried on. Such notice shall be signed by stockholders owning at least ten per cent. of the entire capital stock of said company, and shall state the place where, and the time when, the question of

renewal will be submitted to the votes of the stockholders of said company, at the meeting held in pursuance of such notice, provided a majority of the stock of the corporation be represented. The votes shall be taken by ballot, and each stockholder shall be entitled to as many votes as he owns shares of stock in said company, or holds proxies therefor; and if a majority of the votes cast shall be in favor of a renewal of the corporation, the president and secretary of said company shall, under the corporate seal of said company, certify the fact, and shall make as many certificates as may be necessary, so as to file one in the office of the recorder of deeds in each county where they may do business, and one in the office of the secretary of state; and thereupon the corporate life of said company shall be renewed for another term of not exceeding twenty (20) years, upon filing the declaration aforesaid, and all stockholders shall have the same rights in the renewed corporation as they had in the company as originally formed. [L. '91, p. 96-7, §2.]

§ 397. (568) Right of Way—Prior Rights Protected.

Any ditch, reservoir or pipe line company formed under the provisions of this chapter, shall have the right of way over the line named in the certificate, and shall also have the right to run water from the stream, channel or water course, whether natural or artificial, named in the certificate through its ditch or pipe line, and store the same in any reservoir of the company when not needed for immediate use; Provided, That the line proposed shall not interfere with any other ditch, pipe line or reservoir, having prior rights, except the right to cross by pipe or flume; nor shall the water of any stream, channel or other water course, whether natural or artificial, be diverted from its original channel or source, to the detriment of any person or persons having priority of right thereto, but this shall not be construed to prevent the appropriation and use of any water not theretofore utilized and applied to beneficial uses. [L. '91, p. 98, §2.

§ 398. (569) Assessment—Pro Rata—Vote of Stockholders.

Any corporation owning any ditch or canal for conveying, or reservoir for storing water for irrigating purposes, and the capital stock being fully subscribed and paid up, and when such corporation shall have no income sufficient to keep its ditch, canal or reservoir in good repair, such corporation shall have power to make an assessment on the capital stock thereof, to be levied pro rata on all the shares of stock, payable in money, or labor, or both, for the purpose of keeping the property of such corporation in good repair, and for the payment of any claim against such corporation not otherwise provided for. But no such assessment shall be made unless the question of making such assessment shall first be submitted to the stockholders of such corporation, at an annual meeting, or at a special meeting called for that purpose, and a majority of the stockholders, either in person or by proxy, voting thereon, shall vote in favor of making such assessments, and an action may be maintained to recover any assessment against any delinquent shareholder, as provided in section five (5) of this act. [G. L. '77, p. 172, §276; G. S. '83, p. 199, §310.

§ 399. (570) When Compelled to Furnish Water.

Any company constructing a ditch under the provisions of this Act shall furnish water to the class of persons using the water in the way named in the certificate, in the way the water is designated to be used, whether miners, mill-men, farmers, or for domestic use, whenever they shall have water in their ditch unsold, and shall at all times give the preference to use of the water in said ditch to the class named in the certificate; the rates at which water shall be furnished to be fixed by the county commissioners as soon as such ditch shall be completed and prepared to furnish water. [G. L. '77, p. 172, §277; G. S. '83, p. 199, §311.

§ 399a. (571) Shall Keep Ditch in Repair.

Every ditch company organized under the provisions of this Act shall be required to keep their ditch in good condition so that the water shall not be allowed to escape from the same to the injury of any mining claim, road, ditch, or other property; and whenever it is necessary to convey any ditch over, across, or above any lode or mining claim, or to keep the water so conveyed therefrom, the company shall, if necessary to keep the water of said ditch out, or from any claim, flume the ditch so far as necessary to protect such claim or property from the water of said ditch. [G. L. '77, pp. 172, 173, §278; G. S. '83, p. 199, §312.

§ 399b. (572) Consolidation of Ditch Companies.

Companies organized under the laws of this state holding ditches or canals by virtue of their organization, which derive their supply of water for their respective ditches or canals from the same headgate or gates, or the same source or sources of supply, may consolidate their interests and unite their respective companies under one name and management, by filing a certificate of that fact in the office of the secretary of this state, and a counterpart thereof in the office of the recorder of the county or counties in which such ditches or canals are situated; which certificate shall be signed by the presidents of the companies so uniting, with the common seals of the companies affixed thereto; and shall set forth the fact of such union of interests, and give the name of the new company thus formed. [L. '76, pp. 68, 69, §1; omitted, G. L. '77; G. S. '83, pp. 199, 200, §313.

§ 399c. (573) Shall Commence Work Within Ninety Days—Complete in Two Years—Forfeit—Ditch Three Years

Any company formed under the provisions of this Act for the purpose of constructing any ditch, flume, bridge, ferry or telegraph line shall, within ninety days from the date of their certificate, commence work on such ditch, flume, bridge, ferry or telegraph line, as shall be named in the certificate, and shall prosecute the work with due diligence until the same is completed, and the time of the completion of any such ditch, bridge, ferry or telegraph line shall not be extended beyond a period of two years from the time work was commenced as aforesaid; and any company failing to commence work within ninety days from the date of the certificate or failing to complete the sam

within two years from the time of commencement as aforesaid, shall forfeit all right to the water so claimed, and the same shall be subject to be claimed by any other company; the time for the completion of any flume constructed under the provisions of this Act shall not be extended beyond a period of four years; Provided, This section shall not apply to any ditch or flume for mining or other purposes, constructed through and upon any grounds owned by the corporation; and provided further, That any company formed under the provisions of this Act to construct a ditch for domestic, agricultural, irrigating, milling and manufacturing purposes, or any or either thereof, shall have three years from the time of commencing work thereon within which to complete the same, but no longer. [G. L. '77, pp. 179, 180 § 296; G. S. '83, p. 200, §314.

§ 399*d*. (574) Damaging Road, Ditch, Flume—Penalty

Any person who shall wilfully or maliciously damage or interfere with any road, ditch, flume, bridge, ferry, railroad or telegraph line, or any of the fixtures, tools, implements, appurtenances or any property of any company which may be organized under the provisions of this act, upon conviction thereof before any court of competent jurisdiction in the county where the offense shall have been committed, shall de deemed guilty of a misdemeanor, and shall be punished by fine or imprisonment, or both, at the discretion of the court, said imprisonment not to exceed one year, and said fine not to exceed five hundred dollars, which fine shall be paid into the county treasury for the use of the common schools, and said offender shall also pay all damages that any such corporation may sustain, together with costs of suit. [G. L. '77, p. 180, §297; G. S. '83, p. 200, §315.

FLUME COMPANIES.

§ 399*e*. (575) What Certificate Shall Specify.

When any company shall organize, under the provisions of this Act, to form a company for the purpose of constructing a flume, their certificate, in addition to the matters required in the second section of this Act, shall specify as follows: The place of beginning, the terminus, and the route so near as may be, and the purpose for which such flume is intended, and when organized, according to the provisions of this Act, said company shall have the right of way over the line proposed in such certificate for such flume; Provided, It does not conflict with the rights of any former fluming, ditching or other company. [G. L. '77, p. 173, §279; G. S. '83, pp. 200, 201, §316.

[Ch. 69, "Irrigation," 1 and 3 Mills' Ann. St.]

DIVISION I.—RIGHT OF WAY—APPROPRIATION—USE OF WATER.

§ 400. (2256) Owners of Land on Streams Entitled to Use of Water —Appropriation.

All persons who claim, own or hold a possessory right or title to any land or parcel of land within the boundary of the state

of Colorado, as defined in the constitution of said state, when those claims are on the bank, margin or neighborhood of any stream of water, creek or river, shall be entitled to the use of the water of said stream, creek or river for the purposes of irrigation, and making said claims available to the full extent of the soil, for agricultural purposes. [L. '61, p. 67, §1; R. S. '68, p. 363, §1; G. L. '77, p. 515, §1372; G. S. '83, pp. 560, 561, §1711.

§ 401. (2257) Right of Way Through Farms and Lands.

When any person owning claims in such locality has not sufficient length of area exposed to said stream to obtain a sufficient fall of water to irrigate his land, or that his farm, or land used by him for agricultural purposes, is too far removed from said stream, and that he has no water facilities on those lands, he shall be entitled to a right of way through the farms or tracts of lands which lie between him and said stream, or the farms or tracts of land which lie above and below him on said stream, for the purposes hereinbefore stated. [L. '61, p. 67, §2; R. S. '68, p. 362, §2; G. L. '77, p. 515, §1373; G. S. '83, p. 561, §1712.

§ 402. (2258) Extent of Right of Way.

Such right of way shall extend only to a ditch, dyke or cutting, sufficient for the purpose required. [L. '81, p. 67, §3; R. S. '68, p. 363, §3; G. L. '77, p. 515, §1374; G. S. '83, p. 561, §1713.

§ 403. (2259) Rotation—Water to be Allotted on Alternate Days.

In case the volume of water in said stream or river shall not be sufficient to supply the continual wants of the entire country through which it passes, then the county judge of the county shall appoint three commissioners as hereinafter provided, whose duty it shall be to apportion in a just and equitable proportion a certain amount of said water upon certain or alternate weekly days to different localities, as they may in their judgment think best for the interest of all parties concerned, and with due regard to the legal rights of all. [L. '61, p. 68, §4; R. S. '68, p. 363, §4; amended, L. '70, p. 158, §1; L. '72, p. 144; G. L. '77, pp. 515, 516, §1375; G. S. '83, p. 561, §1714.

An Act to provide for the drainage of wet land.—*Approved March* 21, 1893. *In force June* 19, 1893. L. '93, p. 258.

§ 404. (2260a) Right of Way to Drain Surplus Water—Eminent Domain.

That whenever the owner or owners of any parcel or parcels of land desire to construct a drain for the purpose of carrying off surplus water, and they cannot agree among themselves or with the parties who own the land below, through which it is expedient to carry the drain, in order to reach a natural waterway, then proceedings may be had in the same manner as in cases of eminent domain affecting irrigation works of diversion, and the right of way for such drains shall be regarded as equal to that of irrigation canals. [L. '93, p. 258, §1.

An Act relating to irrigating ditches and manner of their construction.—*Approved February* 12, 1881. *In force May* 5, 1881. L. '81, p. 164.

§ 405. (2261) No Land Burdened with More than One Ditch.

That no tract or parcel of improved or occupied land in this state shall, without the written consent of the owner thereof, be subjected to the burden of two or more irrigating ditches constructed for the purpose of conveying water through said property, to lands adjoining or beyond the same, when the same object can feasibly and practicably be attained by uniting and conveying all the water necessary to be conveyed through such property in one ditch. [L. '81, p. 164, §1; G. S. '83, p. 562, §1716.

§ 406. (2262) Shortest Route Must be Taken.

Whenever any person or persons find it necessary to convey water for the purpose of irrigation through the improved or occupied lands of another, he or they shall select for the line of such ditch through such property the shortest and most direct route practicable, upon which said ditch can be constructed with uniform or nearly uniform grade, and discharge the water at a point where it can be conveyed to and used upon the land or lands of the person or persons constructing such ditch. [L. '81, p. 164, §2; G. S. '83, p. 562, §1717.

§ 407. (2263) Owner of Ditch Must Permit Others to Enlarge —Conditions.

No person or persons having constructed a private ditch for the purposes and in the manner hereinbefore provided, shall prohibit or prevent any other person or persons from enlarging or using any ditch by him or them constructed in common with him or them, upon payment to him or them of a reasonable proportion of the cost of construction of said ditch. [L. '81, p. 164, § 3; G. S. '83, p. 562, §171.

§ 408. (2264) When Heads of Ditches May be Extended up Stream—Condemnation—Proviso as to Other Ditches etc.

In case the channel of any natural stream shall become so cut out, lowered, turned aside or otherwise changed from any cause, as to prevent any ditch, canal or feeder of any reservoir from receiving the proper inflow of water to which it may be entitled from such natural stream, the owner or owners of such ditch, canal or feeder shall have the right to extend the head of such ditch, canal or feeder to such distance up the stream which supplies the same as may be necessary for securing a sufficient flow of water into the same, and for that purpose shall have the same right to maintain proceedings for condemnation of right of way for such extension as in case of constructing a new ditch, and the priority of right to take water from such stream, through such ditch, canal or feeder as to any such ditch, canal or feeder shall remain unaffected in any respect by reason of such extension: Provided, however, That no such extension shall interfere with the complete use or enjoyment of any other ditch, canal or feeder. [L. '81, pp. 161, 162, §1; G. S. '83, p. 562, §1719. For other sections of this Act see §§417-419 *infra*.

MAP AND STATEMENT ACT.

An Act concerning water rights.—*Approved April* 11, 1903. *In force July* 11, 1903. L. '03, p. 289, ch. 126.

§ 409. (2265*a*) Construction or Enlargement of Reservoir or Ditch.

Every person, association or corporation hereafter constructing or enlarging any reservoir or reservoirs, constructing, changing the location of, or enlarging any ditch, canal, or feeder for any ditch or reservoir, for the purpose of furnishing a supply of water for domestic, irrigation, power or storage, or for any other beneficial use, taking water from any natural stream, shall, within sixty days after the commencement of such construction, change of location or enlargement, make filings in the office of the state engineer for each specific claim, in such form as shall seem sufficient and satisfactory to the state engineer, and accompanied by the proper fees, as provided by statute, two duplicate copies, on tracing muslin, or other material adapted for permanent record and preservation, as may be required by regulation of the state engineer, of a map, made with permanent ink, showing the point of location of the headgate, the route of such ditch or canal, or the high-water line of such reservoir or reservoirs, and the route of the feeder or feeders to, and ditches or canals from, such reservoir or reservoirs, the legal subdivisions of the land upon which such structures are built or to be built, if on surveyed lands, the names of the owners of such lands, and such courses, distances and corners by reference to legal subdivisions, if on surveyed lands, or to natural objects, if on unsurveyed lands, as will clearly designate the location of such structures. [L. '03, pp. 289-290, §1.

§ 410. (2265*b*) Duplicate Statements—Contents.

Upon or attached to such maps shall be duplicate statements, showing in the case of any ditch, canal or feeder:

First—The point of location of the headgate of the proposed structure.

Second—The depth, width, grade and length of each ditch, canal or feeder proposed.

Third—The carrying capacity of each ditch, canal or feeder in cubic feet per second.

Fourth—The time of commencement of work on such structures, which time may be the date of the commencement of the surveys therefor, or of the commencement of actual construction.

Fifth—The estimated cost of the proposed project.

In cases when filings are made upon reservoir sites the statements shall show the height of the proposed dam, the estimated cost, with the capacity in cubic feet and the surface area for each foot in depth, of water stored up to and including the high-water mark. [L. '03, p. 290, §2.

§ 411. (2265*c*) Statements—Filing Map.

In case of change, enlargement or extension, such statements shall show the matters required above, referring to the structure before such change or enlargement, and shall then state, also, the information required in the above items, second, third, fourth

and fifth, referring to the structure as enlarged, and in addition thereto, shall state definitely the increase in capacity to be added to the original capacity by virtue of such enlargement. Whenever, through the necessity for extended surveys requiring long periods of time, it shall be impracticable for the claimant or claimants to file a complete map and statement within sixty days, as required above, a map and statement as complete as may be practicable shall be filed, with a further statement that a complete map and statement will be filed later, and upon the completion of such survey a full and detailed map and statement, amending the ones first filed, shall be offered for examination and acceptance in the same manner as herein provided for the original filing. [L. '03, pp. 290-291, §3.

§ 412. (2265*d*) Signing Statements—Swearing to Truth.

Such statements shall be signed by the person or persons in whose behalf they are made, or, in cases where an association or a corporation are the parties interested, the signature shall be the legal title of such association or corporation, signed by some duly authorized agent or officer, who shall also sign his own name, giving his official title, and the truth of the matters shown in such maps and statements shall also be sworn to by the engineer in charge, or person making the survey, before some officer legally qualified for the administration of oaths. [L. '03, p. 291, §4.

§ 413. (2265*e*) Examination by State Engineer—Approval—Filing Duplicate.

The state engineer shall examine the duplicate maps and statements, and if he shall find the data therein contained to be sufficient and satisfactory for a clear presentation of facts concerning the claims made, he shall file one of the maps and statements in his office and shall return the duplicate map and statement to the claimant with a certificate, stating that it has been examined and approved by him, and that it is a duplicate of the copy filed in his official records, and this duplicate copy shall, within ninety days from the time stated as the date of commencement, be filed by the claimant in the office of the county clerk and recorder in which the headgate of the proposed structure, or in which the proposed reservoir shall lie. [L. '03, p. 291, §5.

§ 414. (2265*f*) Certified Copy—Prima Facie Evidence—Proviso.

A certified copy of the map and statement thus filed in the state engineer's office shall be *prima facie* evidence in any court having jurisdiction of the intent of the claimant or claimants to make such construction and to utilize such rights as are shown and described in the map and statement; Provided, That nothing herein contained shall be so construed as to dispense with the necessity for due diligence in the construction of such projects, or to the injury of those having rights prior to those of the claimants; and Provided, further, That nothing herein contained shall be so construed as to prevent a proper adjudication of rights in accordance with existing statutes governing such adjudication. [L. '03, pp. 291-292, §6.

§ 415. (2265*g*) Compliance with Former Act.

All plats and statements or other documents heretofore filed or recorded in substantial compliance with the provisions or

requirements of section 2 of an act entitled "An Act to provide for the extension of the right of way for ditches, canals and feeders of reservoirs in certain cases, and requiring registration of all such hereafter made or enlarged," approved February 11, 1881, shall be taken, deemed and held to constitute a compliance with the provisions of this act. [L. '03, p. 292, §7.

§ 416. (2265h) Repeal.

All acts and parts of acts inconsistent herewith are hereby repealed. [L. '03, p. 292, §8.

§ 417. (2266) Only Irrigation Ditches Referred to in the Last Above Section.

This Act shall apply to and affect only ditches, canals or feeders used for carrying water for the purpose of irrigation, and for no other purpose whatever. [L. '81, p. 161, §3; G. S. '83, p. 563, §1721. For Act referred to, see §408 *supra*.

§ 418. (2267) Water to be Equally Divided Among Consumers Prorated.

If at any time any ditch or reservoir from which water is or shall be drawn for irrigation shall not be entitled to a full supply of water from the natural stream which supplies the same, the water actually received into and carried by such ditch, or held in such reservoir, shall be divided among all the consumers of water from such ditch or reservoir, as well as the owners, shareholders or stockholders thereof, as the parties purchasing water therefrom, and parties taking water partly under and by virtue of holding shares and partly by purchasing the same, to each his share *pro rata*, according to the amount he, she or they (in cases in which several consume water jointly) shall be then entitled, so that all owners and purchasers shall suffer from the deficiency arising from the cause aforesaid each in proportion to the amount of water to which he, she or they should have received in case no such deficiency of water had occurred. [L. '79, p. 97, §4; G. S. '83, p. 563, §1722; see L. '61, p. 68, §4.

§ 419. (2268) Irrigation of Meadows—Right to Make Ditch—Priority.

All persons who shall have enjoyed the use of the water in any natural stream for the irrigation of any meadow land, by the natural overflow or operation of the water of such stream, shall, in case the diminishing of water supplied by such stream, for any cause, prevent such irrigation therefrom in as ample a manner as formerly, have right to construct a ditch for the irrigation of such meadow, and to take water from such stream therefor, and his or their right to water through such ditch shall have the same priority as though such ditch had been constructed at the time he, she or they first occupied and used such land as meadow-ground. [L. '79, p. 106, §37; G. S. '83, pp. 563, 564, § 1723.

§ 420. (2269) Priority of Right.

That all ditches now constructed or hereafter to be constructed for the purpose of utilizing the waste, seepage or spring waters of the state, shall be governed by the same laws relating

to priority of right as those ditches constructed for the purpose of utilizing the waters of running streams; Provided, That the person upon whose lands the seepage or spring waters first arise, shall have the prior right to such waters if capable of being used upon his lands. [L. '89, p. 215, §1.

An Act in relation to water for domestic purposes.—*Approved April* 1, 1891. *In force April* 1, 1891. L. '91, p. 402.

§ 421. (2269*a*) Water Appropriated for Domestic Purposes Not Used for Irrigation.

Water claimed and appropriated for domestic purposes shall not be employed or used for irrigation or for application to land or plants in any manner to any extent whatever; Provided, That the provisions of this section shall not prohibit any citizen or town or corporation organized solely for the purpose of supplying water to the inhabitants of such city or town from supplying water thereto for sprinkling streets and extinguishing fires or for household purposes. [L. '91, p. 402, §1.

§ 422. (2269*b*) Diverting Water—Penalty.

Any person claiming the right to divert water for domestic purposes from any natural stream who shall apply or knowingly permit the water so diverted to be applied for other than domestic purposes to the injury of any other person entitled to use such water for irrigation shall be deemed guilty of a misdemeanor and upon conviction shall pay a fine of not less than fifty dollars and not exceeding two hundred dollars in the discretion of the court wherein conviction is had. Each day of such improper application of water obtained in the manner aforesaid shall be deemed a separate offense. Justices of the peace in their several precincts shall have jurisdiction of the aforesaid offense subject to the right of appeal as in cases of assault and battery. [L. '91, p. 403, §2.

DRAINAGE DITCHES.

An Act to enable the owners of lands to drain and reclaim them when the same can be done without affecting the lands of others, describing the powers and duties of county commissioners and others in the premises, and to provide for the enlargment [enlargement] and extension of the same. *Approved April* 11, 1903. *In force July* 11, 1903. L. '03 p. 209, ch. 103.

§ 423. (2269*c*) Enlargement of Drain or Ditch—Petition.

Whenever any person, company or corporation desires the construction, enlargement or extension of a ditch, drain or water course for the purpose of draining and reclaiming seeped or marshy land, they shall file with the board of county commissioners of the county or counties in which such improvement or improvements are to be located, a petition signed by one or more of the land owners who own or represent the major portion of the land which would be affected by the proposed improvement. [L. '03, pp. 209-210, §1.

§ 424. (2269*d*) Contents—Plat.

Said petition shall set forth the necessity for and probable benefits of such ditch, drain or water course, together with a list

of the lands affected by the proposed improvement, and whether such lands so affected are in one or more counties, and therein naming the county or counties where such land is located, or through which said improvement may pass, and the names and addresses of the owners of such lands, and there shall be attached to said petition a plat showing approximately the location, direction, size and length of said drain, ditch or water course. [L. '03, p. 210, §2.

§ 425. (2269e) Bond of Petitioner.

The petitioner or petitioners shall give a good and sufficient bond, payable to the county or counties and approved by the county clerk, conditioned, in case said drain, ditch or water course from any cause whatsoever is not constructed, to pay all expenses incurred by the county or counties on account of said proposed improvements. [L. '03, p. 210, §3.

§ 426. (2269f) Viewers—Proceedings—Hearing—Notice.

When such petition plat and bond are filed the board of county commissioners of each county where such improvements is [are] to be made shall appoint a board of viewers consisting of three disinterested persons, residents of the county where the improvement is [are] to be, who in turn shall select a competent engineer to assist them, and in the event that such improvement extends into more than one county when the board of commissioners of each county where such improvement is to be made shall take like action, and the same procedure shall be necessary of each county or board of county commissioners and of all petitioners or parties interested as would be necessary if the entire improvement were to be made in one county only. The board of viewers of each county wherein such improvement is to be made shall then proceed at once to view the line of the proposed drain and the lands affected thereby lying within the county for which they were appointed, and shall cause the engineer to prepare accurate surveys and estimates of the proposed work on the land lying within the county for which they were appointed, and shall set a day and place for hearing the views of all interested parties, receive protests, information, and any matter in relation to the proposed improvements; and the board of viewers shall notify all the resident land holders of their county affected by such improvement by personal service twenty days prior to the date of such meeting and personal service of said notice can not be had, or if any of said land holders are non-residents, then said notice shall be sent through the mail; and shall also caused [cause] to be published a copy of said notice in some weekly newspaper in said county for a period of not less than four weeks prior to said meeting. [L. '03, pp. 210-211. §4

§ 427. (2269g) Testimony and Affidavits—Joint Report—Appearance.

All persons whose lands may be affected may appear at the time specified for the said meeting before said board of viewers and present such testimony and affidavits as shall relate to the proposed drainage system, with such recommendations and objections as shall to them seem pertinent and necessary. If the proposed improvement extends into more than one county

then the viewers appointed by each board of county commissioners of the county wherein a part of such improvement is to be made, shall meet at some point agreed upon by the different boards of viewers of the different counties and there prepare a joint report upon all matters and things required of a board of viewers where the improvement is in a single county, and shall then forward to each board of county commissioners of each county for which they are appointed a copy of said joint report, but this shall not be construed so as to require the persons whose lands are affected thereby by this section to appear before said board when acting jointy [jointly] unless it would be more convenient [convenient] for hearing provided for by this section to be a joint one by the different reviewing boards of the different counties. [L. '03, p. 211, §5.

§ 428. (2269*h*) Improvement Not Feasible.

If the viewers shall find that the proposed improvement is not feasible, they shall so report to the board of county commissioners, and the costs and expenses incurred shall be paid by the original petitioners, as provided under their bond. [L. '03, p. 212, §6

§ 429. (2269*i*) When Feasible—Viewers' Report Proviso.

If, however, the improvements shall be found feasible and of use and benefit and to be desired by owners representing a major part of the lands affected, the board of viewers shall so report to the board of county commissioners, and shall include in their report a detailed recommendation of the method to be pursued in prosecuting the work, and shall submit plans and specifications for the letting of contracts and fix and recommend the proportionate assessment for each tract of land affected, which assessment shall be proportionate to the benefits accruing to each of such tracts; Provided, however, That any person interested therein who shall feel agrieved [aggrieved] at the report and finding of the board of county commissioners shall have the right of appeal to the district court of said county and have such matters passed upon by a jury. [L. '03, p. 212, §7.

§ 430. (2269*j*) Allotment of Work—Proviso—Bond.

The board of viewers may, by agreement of the land owners, recommend the allotment to each of a portion of the improvement; Provided, however, That each said owner shall give a good and sufficient bond for the proper performance of his proportion of the work so allotted. [L. '03, p. 212, §8.

§ 431. (2269*k*) Advertisement for Bids—Contract—Bond.

In case no such allotment or division of the work is made, or in case all of it shall not be so allotted, the county commissioners shall cause an advertisement to be inserted in a daily or weekly paper of general circulation in the vicinity for a period of thirty days. Said advertisement shall be a notice to the land owners of the work proposed and shall call for bids on the work, in accordance with the recommendations of the board of viewers, and the contract shall be let to the lowest responsible bidder for the entire work lying within their respective counties, or to the lowest responsible bidders on each of the several portions of the

work. The successful bidder or bidders shall file a good and sufficient bond with the board of county commissioners for the faithful performance of their contract. [L. '03, pp. 212 213, §9.

§ 432. (2269*l*) Completion—Division of Expense—Assessment.

When the work shall have been completed and accepted by the engineer in charge, the county commissioners shall determine the total cost, damages and other expenses, and divide the same among the several tracts of land affected, in their respective counties, in the proportion determined by the board of viewers, and shall certify to the county assessor or assessors if in more than one county, a list of the lands affected, the total amounts to be assessed against each, with all credits for work or damages due the owner of each tract, with the net assessment of each, and the assessor or assessors if in more than one county shall enter the said net assessment against each of the several tracts of land lying within his county in the same manner as for other taxes, and the county treasurer of each county where such improvement or part thereof is to be made, shall collect the same and reimburse the county for all moneys expended or expenses incurred subject to the right of appeal to the district court as to matters herein as in cases of appeal from disallowance of claims by board of county commissioners. [L. '03, p. 213, §10.

§ 433. (2269*m*) Acceptance—Vouchers.

Upon the proper acceptance by the engineer or engineers if such improvement is in more than one county the board of county commissioners of each county where such improvement is located, shall cause a voucher to be drawn upon the county treasurer for the amounts due on contracts, for damages and other expenses. [L. '03, p. 213, §11.

§ 434. (2269*n*) Viewers and Engineers—Compensation.

Each of the members of the board of viewers shall receive their necessary expenses and three dollars per day for services, and the engineers shall receive his [their] necessary expenses and six dollars per day for each day necessarily employed. [L. '03, p. 213, §12.

§ 435. (2269*o*) Right of Eminent Domain.

The right of eminent domain shall extend to all improvements constructed under this act. [L. '03, p. 213, §13.

§ 436. (2269*p*) Water Prorated.

All waters gathered by such drainage improvement shall be the property of those from whose lands the same is taken by such drainage canal, and the same shall be pro-rated among the different land holders from which such water is taken according to the cost of the improvement assessed against each one. [L. '03, pp. 213-214, §14.

RESERVOIRS.

§ 437. (2270) Reservoirs—Right to Water—Right of Way—Condemnation—Embankments Over Ten Feet Submit to County Board.

Persons desirous to construct and maintain reservoirs, for the purpose of storing water, shall have the right to take from any

of the natural streams of the state and store away any unappropriated water not needed for immediate use for domestic or irrigating purposes; to construct and maintain ditches for carrying such water to and from such reservoir, and to condemn lands for such reservoirs and ditches in the same manner provided by law for the condemnation of land for right of way for ditches; Provided, No reservoir with embankments or a dam exceeding ten feet in height shall be made without first submitting the plans thereof to the county commissioners of the county in which it is situated, and obtaining their approval of such plans. [L. 79, pp. 106, 107, §38; G. S. '83, p. 564, §1724.

An Act in relation to reservoirs.—*Approved April* 6,1899. *In force July* 6, 1899. L. '99, p. 314, ch. 126.

§ 438. (2270*a*) Construction of Reservoirs—Statement.

No reservoir of a capacity of more than seventy-five millions cubic feet of water, or having a dam or embankment in excess of ten feet in vertical height, and covering an area of more than 20 acres shall hereafter be constructed in this state, except the plans and specifications of the same shall first be approved by the state engineer; and the state engineer shall act as consulting engineer during the construction thereof, and shall have authority to require the material used and the work of construction to be done to his satisfaction; and no work shall be deemed complete under the provisions of this act until the state engineer shall give to the owners of such structures a written statement of the work of construction and the full completion thereof together with his acceptance of the same, which statement shall specify the dimensions and capacity of such reservoir or reservoirs. [L. '99, p. 314, § 1.

§ 439. (2270*b*) Cost of Inspection and Supervision.

The owners of such reservoirs shall pay to said state engineer his actual expenses incurred in making personal inspection, and five dollars per day and expenses to any deputy appointed by him to attend to such supervision when necessarily employed for such purpose. [L. '99, p. 314, §2.

§ 440. (2270*c*) Engineer Determine Amount of Water.

The state engineer shall annually determine the amount of water which it is safe to impound in the several reservoirs within this state and it shall be unlawful for the owners of any reservoir to store in said reservoir water in excess of the amount so determined by the state engineer to be safe. [L. '99, p. 315, §3.

§ 441. (2270*d*) Water Commissioner Withdraw Excess Water.

In the event of the owners of any such reservoir impounding water therein to a depth greater than that determined by the state engineer to be safe, it shall be the duty of the water commissioner of the district where in such reservoir shall be located to forthwith proceed to withdraw from said reservoir so much, of the water so impounded therein as shall be in excess of the amount so determined by the state engineer to be safe, and shall close the inlets to the same so as to prevent said reservoir from being refilled to an amount beyond what said state engineer shall have designated as being safe. In the event of the owners

of said reservoir, or any other person or persons, interfering with the water commissioner in the discharge of said duty, the said water commissioner shall call to his aid such persons as he deems necessary, and employ such force as the circumstances demand to enable him to comply with the requirements of this section. [L. '99, p. 315, §4.

§ 442. (2270e) Engineer Examine Reservoir—Withdraw Excess Water.

Upon complaint being made to the state engineer by three or more persons residing or having property in such a location that their homes or property would be in danger of destruction or damage in the event of a flood occurring, on account of the breaking of the embankment of any reservoir within the state, that said reservoir is in an unsafe condition, or that it is being filled with water to such an extent as to render it unsafe, it shall be the duty of the state engineer to forthwith examine said reservoir and determine the amount of water it is safe to impound therein. If, upon such examination, the state engineer shall find that said reservoir is unsafe, or is being filled with water to such an extent as to render it unsafe, it shall be his duty to immediately cause said water to be drawn off from said reservoir, to such an extent as will, in his judgment, render the same safe. If water is then flowing into said reservoir, he shall cause the same to be discontinued. [L. '99, pp. 315-316, §5.

§ 443. (2270f) Engineer Employ Force—Duty of Water Commissioner.

The state engineer is hereby authorized and empowered to use such force as is necessary to perform the duties required of him in the preceeding [preceding] section, and to have and exercise all of the powers conferred upon the water commissioner by section 4 of this act. If, after any of such reservoirs shall have been examined by said state engineer, the owners thereof, or any other person or persons, shall fill or attempt to fill them, or either of them to a point in excess of the amount the state engineer shall have determined to be safe, then it shall be the duty of the water commissioner of the district wherein such reservoir is located proceed as is directed by section 4 of this act. [L. '99, p. 316, §6.

§ 444. (2270g) Expense of Examination.

The persons calling upon the state engineer to perform the duty required of him by section 5 hereof shall pay him mileage in advance at the rate of ten cents per mile for each mile actually and necessarily traveled in going to and from said reservoir, and should the state engineer find upon examination that such reservoir is in an unsafe condition, the owners thereof shall be liable for all expenses incurred in such examination. [L. '99, p. 316, §7.

§ 445. (2270h) Appeal to Court—Proviso.

In the event of either party being dissatisfied with the decission [decision] of the state engineer, they may take an appeal to the county, or district court of the county wherein said reservoir is located, and said court shall hear and determine the matter summarily at the earliest practical time without written plead-

ings or the aid of a jury; subject to the right of either party to take an appeal or writ of error as in other civil cases; Provided, That the judgment of the state engineer shall control until final determination of the cause. [L. '99, p. 316, §8.

§ 446. (2270*i*) Owners Liable for Damages.

None of the provisions of this act shall be construed as relieving the owners of any such reservoir from the payment of such damages as may be caused by the breaking of the embankments thereof, but in the event of any such reservoir overflowing, or the embankments, dams or outlets breaking or washing out, the owners thereof shall be liable for all damages occasioned thereby. [L. '99, pp. 316-317. §9.

§ 447. (2270*j*) Failure to Comply—Fines—Disposition.

Any reservoir company failing or refusing, after ten days notice in writing having been given, to obey the directions of the state engineer as to the construction or filling of any reservoir as herein provided, shall be subject to a fine of not less than fifty dollars, for each offense, and each day's continuance after time of notice has expired shall be considered a separate offense; such fines to be recovered by civil action in the name of the people, by the district attorney, upon the complaint of the state engineer, and in the county where the injury complained of occurred, the proceeds of all fines, after payment of costs and charges of the proceedings, shall be paid into the county treasury for the use of the general fund of the county. [L. '99, p. 317, §10.

An Act to promote irrigation of the arid lands within this state by water obtained from wells or sources other than the flow from natural sources.—*Approved April* 11, 1903. *In force July* 11, 1903. L. '03, p. 262, ch. 122.

§ 448. (2270*k*) Survey of Reservoir Site.

It shall be the duty of the county surveyor of each county within this state upon the request of the owner of ten or more acres of arid land lying in such county, to locate and survey an available site for a reservoir upon such land, such reservoir to be used for the storage of water to irrigate the land contiguous thereto and such reservoir to be of a capacity to hold sufficient water to properly irrigate not less than ten acres of such land. [L. '03, p. 232, §1.

§ 449. (2270*l*) Construction of Reservoir—Outlet.

Within thirty (30) days after such location and survey by the county surveyor, the owner of such land shall begin the construction of such reservoir and shall work continuously thereon until the completion thereof and all of such work of construction and the construction of such dam or dams as may be necessary, and the construction of the outlet to such reservoir shall be done under the direction and supervision of such county surveyor. [L. '03, pp. 262-263, §2.

§ 450. (2270*m*) Completion—File Map or Plat—Contents.

Upon the completion of the reservoir it shall be the duty of the county surveyor to file with the board of county commis-

sioners of such county, a map or plat of the land upon which such reservoir it located; describing such land by legal subdivisions and showing thereon the name of the owner, the number of acres of arid land contiguous to such reservoir claimed by such owner; the size or water capacity in cubic feet of such reservoir; the number of acres of land capable of being irrigated by such reservoir; the source and means of supplying such reservoir with water, and indicating the point of location upon the land of such reservoir. [L. '03, p. 263, §3.

§ 451. (2270n) Approval—Repairs.

It shall be the duty of such board of county commissioners to, within sixty (60) days after the filing of such map or plat, to approve the same by resolution spread upon the records of such board. That it shall be the duty of such owner or his tenant, to use such reservoir and keep the same in good repair and in a safe condition. [L. '03, p. 263, §4.

§ 452. (2270o) Inspection of Reservoirs—Unsafe.

It shall be the duty of the county surveyor to annually inspect each reservoir within his county so constructed under the provisions of this act, and he shall file with the board of county commissioners a report in writing showing the condition of such reservoir and a statement as to inspection for the purposes contemplated by this act; and should he find any such reservoir, or dam or outlet thereof, in an unsafe and dangerous condition he shall in writing so notify the owner or tenant thereof as provided in section three hereof; and should such owner or his tenant fail or refuse within the aforesaid period of thirty days (30) to place such reservoir, dam and outlet in a safe and proper condition, then and in that event it shall be the duty of the said county surveyor to immediately let out and release under his direct supervision any and all waters that may have been accumulated in such reservoir; and the said county surveyor shall within ten (10) days thereafter file with the board of county commissioners a report in writing of his acts in the premises. [L. '03, pp. 263-264, §5.

§ 453. (2270p) County Surveyor—Compensation.

The county surveyor shall be paid for his services at the time of making such survey and location, the sum of ten dollars ($10) and all the necessary traveling expenses, and upon the completion of such reservoir and the filing of the map or plat specified in section 3 hereof he shall be paid the further sum of five dollars ($5) and all necessary traveling expenses and superintending the construction of such reservoir, dam and outlet, and such payments and traveling expenses shall be borne by said owner or tenant of such reservoir and land; and for annually inspecting and filing his report of the condition of such reservoir within his county as specified in section 4 hereof, the county surveyor shall be paid the sum of five dollars ($5.00) for each of such reservoirs so inspected and so reported upon, out of the general fund of such county. [L. '03, p. 264, §6.

§ 454. (2270q) Damages.

County surveyors and members of boards of county commissioners within this state shall not be liable in damages for any act done by them in pursuance of the provisions of this act. [L. '03, p. 264, §7.

An Act to provide for the leasing and distributing of the waters stored or to be stored in state reservoirs.—*Approved April* 7, 1899. *In force April* 7, 1899. L. '99, p. 350, ch. 140.

§ 455. (2270r) Charge of Water in Reservoir—Proviso.

The board of county commissioners of any county wherein is situated any state reservoir, shall have charge and control of such reservoir and shall, without expense to the state of Colorado, maintain and keep said reservoir in good condition and provide for the storage of water as contemplated in the Act providing for the construction of said reservoir, and also for the distribution of said water under the direction of the water commissioner for the district in which said reservoir is situated, at such times as the scarcity of water in the stream which such reservoir is intended to reinforce demands that the water in said stream should be replenished for the purpose of irrigating the lands under ditches now or hereafter to be constructed; Provided, That said waters shall be distributed by said water commissioner pro rata without reference to priority of water rights and without expense to consumers thereof; and Provided, also, That the counties in which said reservoirs are situated assume and shall be held responsible for any damages resulting from breakage of the dams or water discharges therefrom; and Provided, further, That the provisions of this Act shall not apply to any state reservoir constructed primarily for the purpose of irrigating state lands, but and such reservoir shall remain in the control of the state board of land commissioners. [L. '99, pp. 350-351, §1.

§ 456. (2271) Conducting Water from Reservoirs Through Natural Streams—Taking Out—Allowance for Scapage—How Determined.

The owners of any reservoir may conduct the water therefrom into and along any of the natural streams of the state, but not so as to raise the waters thereof above ordinary high-water mark, and may take the same out again at any point desired, without regard to the prior rights of others to water from said stream; but due allowance shall be made for evaporation and scapage [seepage] the amount to be determined by the commissioners of irrigation of the district; or, if there are no such commissioners, then by the county commissioners of the county in which the water shall be taken out for use. [L. '79, p. 107, § 39; G. S. '83, p. 564, §1725.

An Act to provide for and to regulate the exchange of water between reservoirs and ditches and the public streams.—*Approved April* 9, 1897. *In force July* 8, 1897. L. '97, p. 176, ch. 58.

§ 457. (2271a) Exchange of Water.

That whenever any person or company shall divert water from one public stream and turn it into another public stream,

such person or company may take out the same amount of water again, less a reasonable deduction for seepage and evaporation, to be determined by the state engineer. [L. '97, p. 176, §1.

§ 458. (2271*b*) Maintain Flumes and Register Water.

Any person or company transferring water from one public stream to another shall be required to construct and maintain under the direction of the state engineer measuring flumes or weirs and self-registering devices at the point where the water leaves its natural watershed and is turned into another, and also at the point where it is finally diverted for use from the public stream. [L. '97, p. 176, §2.

§ 459. (2271*c*) Water Commissioner Keep Record.

It shall be the duty of the water commissioner of the district in which the water is used to keep a record of the amount of water so turned into his district from any other district. [L. '97, p. 176, §3.

§ 460. (2271*d*). Reservoirs and Ditches Exchange—Proviso.

When the rights of others are not injured thereby, it shall be lawful for the owner of a reservoir to deliver stored water into a ditch entitled to water or into the public stream to supply appropriations from said stream, and take in exchange therefor from the public stream higher up an equal amount of water, less a reasonable deduction for loss, if any there be, to be determined by the state engineer; Provided, That the person or company desiring such exchange shall be required to construct and maintain under the direction of the state engineer measuring flumes or weirs and self-registering devices at the point where the water is turned into the stream or ditch taking the same or as near such point as is practicable so that the water commissioner may readily determine and secure the just and equitable change of water as herein provided. [L. '97, p. 177, §4.

§ 461. (2271*e*) Repeal.

All acts and parts of acts inconsistent with this Act are hereby repealed. [L. '97, p. 177, §5.

§ 462. (2272) Liability of Owners for Damage.

The owners of the reservoirs shall be liable for all damages arising from leakage or overflow of the waters therefrom or by floods caused by breaking of the embankments of such reservoirs. [L. '79, p. 107, §40; G. S. '83, p. 564, §1726.

WHEELS IN PUBLIC STREAMS.

§ 463. (2273) Right to Place Wheels on Streams—Conditions.

All persons on the margin, brink, neighborhhood or precinct of any stream of water, shall have the right and power to place upon the bank of said stream a wheel, or other machine for the purpose of raising water to the level required for the purpose of irrigation, and the right of way shall not be refused by the owner of any tract of land upon which it is required, subject of

course to the like regulations, as required for ditches, and laid down in sections hereinbefore enumerated. [L. '61, pp. 68, 69, §8; R. S. '68, p. 364, §6; G. L. '77, p. 516, §1377; G. S. '83, p. 564, §1727.

§ 464. (2273*a*—2273*b*)

The matter that would have constituted these sections is found in L. '99, pp. 235-236, §§1-2. But this matter is repealed by 3 Mills (2 ed.), §§2273d-2273j. *Post*, §§466-472.

LOANING WATER.

An Act in relation to irrigation.—*Approved April* 6, 1899. *In force April* 6, 1899. L. '99, p. 236, §3.

§ 465. (2273*c*) Exchange or Loan Water Right.

It shall be lawful, however, for the owners of ditches and water rights taking water from the same stream, to exchange with, and loan to, each other, for a limited time, the water to which each may be entitled, for the purpose of saving crops or of using the water in a more economical manner; Provided, That the owner or owners making such loan or exchange, shall give notice in writing signed by all the owners participating in said loan or exchange, stating that such loan or exchange has been made, and for what length of time the same shall continue, whereupon said water commissioner shall recognize the same in his distribution of water. [L. '99, p. 236, §3.

CHANGING POINT OF DIVERSION.

An Act in relation to the procedure in changing the point of diversion of the right to use water from the streams of the state. —*Approved March* 27, 1903. *In force March* 27, 1903. L. '03, p. 278, ch. 124.

§ 466. (2273*d*) Changing Point of Diversion—Practice and Procedure.

Every person, association or corporation desirous of changing in whole or in part the point or points of diversion of his or its right to use water from any of the streams of the state, shall present a petition to the district court from which the original decree issued, whether the change be from one district to another or not; praying that such change be granted. The practice and procedure upon all petitions, save as herein provided, shall be the same as if the petition were for an original statutory decree; and if the change be from one district to another, the court in which the petition is filed, shall require notice and service in each district intervening between the original and the new points of diversion in the manner as now provided by law for statutory water adjudications in said several districts, save that all process or notice shall be issued from and returnable to the court in which the petition is filed as aforesaid. [L. '03, p. 278, §1.

§ 467. (2273*e*) Notice to Parties Affected.

The court shall require proof that all parties who may be affected by the change have been duly notified in the proceeding

as in the case of an original adjudication, and shall hear evidence to determine whether such change will injuriously affect the vested rights of others in and to the use of water, and a decree shall be entered permiting [permitting] the change as prayed for, unless it appear that such change will injuriously affect the vested rights of others; and if such injury appear, the court shall decree the change only upon such terms and conditions as may be necessary to prevent such injurious effect, or to protect the parties affected or if impossible so to do, may deny said application. [L. '03, pp. 278-279, §2.

§ 468. (2273*f*) Changes Embraced in One Petition—Consolidation.

Applications to change two or more points of diversion to the same common point, may be embraced in one petition, or if separately made in the same court, may be consolidated; and petitions separately filed in the same court for changes to several points may be consolidated by the court or judge for notice, hearing or otherwise, if it appear practicable so to do; and the court or judge shall have power to extend the time for service, notice and appearance, and to make all necessary or expedient rules in the proceeding as in the case of a statutory water adjudication. [L. '03, p. 279, §3.

§ 469. (2273*g*) Filing Certified Copies of Decree—Notices.

Upon the granting of a decree of change, the petitioner desirous of making the change, shall cause to be prepared certified copies of the decree, and shall cause filings thereof to be made with the county clerk of the county in which the original point of diversion is located, and with the county clerk of the county in which the new point of diversion is, or is to be located, and also in the office of the state engineer. Thereupon the change decreed shall be recognized in the distribution of water, the priority rights being alloted [allotted] according to the terms of the said decree, and the state engineer shall immediately issued [issue] notices to that effect to the water commissioners in the water district or districts affected, and to the division superintendent or superintendents in said divisions. [L. '03, p. 279, §4.

§ 470. (2273*h*) File Copy—Record of Decree.

In case a change be decreed from one district to another, the petitioner shall file a certified copy of the decree of change in the court having jurisdiction of the statutory water adjudication in the district of the new point of diversion, and thereupon, on motion, the court in which the copy is so filed, shall order a record of the decree of change, and the original decree theretofore entered in said court shall accordingly stand modified as to the matters contained in the said decree of change. [L. '03, pp. 279-280, §5.

§ 471. (2273*i*) Re-arguments, Reviews and Appeals—Proviso.

Re-arguments and reviews of and appeals from decrees entered hereunder may be had as in case of a statutory water adjudication; Provided, however, They be prayed within thirty days from the time of entering the decree complained of. [L. '03, p. 280, §6.

§ 472. (2273*j*) Repeal—Proviso—Cases Pending.

All acts or parts of acts inconsistent with this act are hereby repealed; Provided, Such repeal shall not affect any proceedings for the change of the point of diversion of the use of water pending when this act takes effect. [L. '03, p. 280, §7.

DIVISION II.—DUTIES OF OWNERS.

§ 473. (2274) Owner Shall Maintain Embankments—Tail Ditch.

The owner or owners of any ditch for irrigation or other purposes, shall carefully maintain the embankments thereof, so that the waters of such ditch may not flood or damage the premises of others, and shall make a tail ditch, so as to return the water in such ditch with as little waste as possible into the stream from which it was taken. [R. S. '68, p. 364, §7; amended, L. '72, p. 144, §1; L. '76, p. 78, §2; G. S. '83, pp. 564, 565, §1728.

§ 474. (2275) Vested Rights of Mill and Ditch Owners.

Nothing in this chapter contained shall be so construed as to impair the prior vested rights of any mill or ditch owner or other person to use the waters of any such water-course. [L. '61, p. 69, §10; amended, R. S. '68, p. 364, §8; G. L. '77, p. 516, §1379; G. S. '83, p. 565, §1729.

§ 475. (2276) Crossing Highways—Bridge.

Any ditch company constructing a ditch, or any individual having ditches for irrigation, or for other purposes, wherever the same be taken across any public highway or public traveled road, shall put a good substantial bridge, not less than fourteen feet in breadth, over such water-course where it crosses said road. [R. S. '68, p. 364, §10; G. L. '77, pp. 516, 517, §1381; G. S. '83, p. 565, §1730.

§ 476. (2277) Ditch Must be Bridged in Three Days—Duty of Supervisor.

When any such ditch or water-course shall be constructed across any public traveled road, and not bridged within three days thereafter, it shall be the duty of the supervisor of the road district to put a bridge over said ditch or water-course, of the dimensions specified in section 10 of this chapter, and call on the owner or owners of the ditch to pay the expenses of constructing such bridge. [R. S. '68, p. 364, §11; G. L. '77, p. 517, §1382; G. S. '83, p. 565, §1731.

An Act to compel the owners of canals and ditches situated within cities of the first class, or cities exising by special charter, of a population equal to or exceeding said cities of the first class to confine, flume and cover the same at their own expense.—*Approved March* 29, 1887. *In force March* 29, 1887. L. '87, p. 65.

§ 477. (2278) Canals and Ditches—When and by Whom to be Covered.

That every corporation and company whether created by special act, or organized under the general incorporation laws of this state and every partnership, person or persons who now,

or may at any time hereafter, own or control any canal or ditch, or any part thereof, being two feet in width or over, and carrying water to the depth of twelve inches or over, which canal or ditch, or any part thereof, is within the corporate limits of any city denominated in the law as of the first class, or any city existing by special charter of a population equal to or exceeding said cities of the first class, or any of the additions thereto, shall, at their own expense, within sixty days after this act shall have taken effect, confine, flume and cover over, all or any part of such canal or ditch, whether located on, or across private property, public highways or alleys in said city or additions thereto, in a reasonable and sufficient manner and with such materials, as will render such fluming or covering, safe and a sure protection to the lives and property of the inhabitants of said city; and any such corporation, company, partnership, person or persons, shall at all times thereafter keep and maintain any and all such structures confining, fluming and covering of such canal or ditch in good order and repair at their own expense. [L. '87, p. 65, §1.

§ 478. (2279) Head to be Latticed.

Such corporation, company, partnership, person or persons, shall, at their own expense, safely and securely lattice or slat the head of such flume or covering with proper materials, so that persons or animals can not accidentally enter such flume or covering at the head thereof and pass, or be carried down the curent of said canal or ditch, and shall theerafter maintain and keep the same in good order and repair at their own cost and expense. [L. '87, p. 66, §2.

§ 479. (2280) Penalty for Failure or Refusal—Proviso.

If any such corporation, company, partnership, person or persons, shall fail or refuse to comply with any of the provisions of the two preceding sections, such corporation, company, partnership, person or persons, shall forfeit and pay to the county, for the use of the common school fund, the sum of fifty dollars for each and every day such failure or refusal shall continue; to be recovered by a civil action in the name of the people of the state of Colorado, in any court of competent jurisdiction. Provided, That nothing in this act shall be construed to bar an action for special damages by any person who shall have suffered such damages by reason of any failure to comply with any of the provisions of this act. [L. '87, p. 66, §3.

§ 480. (2281) Proceedings Against Owner for Payment—Damages.

If the owner or owners of such ditch refuse to pay the bill of expenses so presented, the supervisor may go before any justice of the peace in the township or precinct, and make oath to the correctness of the bill, and that the owner or owners of the ditch refuse payment; and thereupon such justice of the peace shall issue a summons against such owner or owners, requiring him or them to appear and answer to the complaint of such supervisor in an action of debt for the amount sworn to be due, such summons to be made returnable and served, and proceedings to be had thereon as in other cases; and in case judgment shall be given against such owner or owners, the justice shall assess, n addition to the amount sworn to be due as aforesaid, the sum

of ten dollars, as damages arising from the delay of such owner or owners, such judgment to be collected as in other cases, and to be a fund in the hands of the supervisor of roads, for the repairs of roads in such precinct or district. [R. S. '68, p. 365, §12; G. L. '77, p. 517, §1383; G. S. '83, p. 565, §1732.

§ 481. (2282) Owner of Ditch Must Prevent Waste.

The owner of any irrigating or mill ditch shall carefully maintain and keep the embankments thereof in good repair, and prevent the water from wasting. [L. '76, p. 78, §1; G. L. '77, p. 518, §1385; G. S. '83, p. 565, §1733.

§ 482. (2283) Running Excess of Water Forbidden.

During the summer season it shall not be lawful for any person or persons to run through his or their irrigating ditch any greater quantity of water than is absolutely necessary for irrigating his or their said land, and for domestic and stock purposes; it being the intent and meaning of this section to prevent the wasting and useless discharge and running away of water. [L. '76, p. 78, §2; G. L. '77, p. 518, §1386; G. S. '83, p. 566, §1734.

§ 483. (2284) Penalty for Violation of this Act.

Any person who shall willfully violate any of the provisions of this act shall, on conviction thereof before any court having competent jurisdiction, be fined in a sum of not less than one hundred (100) dollars. Suits for penalties under this act shall be brought in the name of the people of the State of Colorado. [L. '76, p. 78, §3; G. L. '77, p. 518, §1387; G. S. '83, p. 566, §1735.

An Act to provide for head-gates for irrigating ditches.—*Approved February* 11, 1881. *In force May* 12, 1881. L. '81, p. 165.

§ 484. (2285) Owner Keep Head-gate—Size of Timbers.

That the owner or owners of every irrigating ditch, flume or canal, in this state, shall be required to erect and keep in good repair a head gate at the head of their ditch, flume or canal. Such head gate, together with the necessary embankments, shall be of sufficient height and strength to control the water at all ordinary stages. The frame work of such head gate shall be constructed of timber not less than four inches square, and the bottom, sides, and gate or gates, shall be of plank not less than two inches in thickness. [L. '81, p. 165, §1; G. S. '83, p. 566, §1736.

§ 485. (2286) Liability of Owner for Neglect—Refusal.

Owners of all ditches shall be liable for all damages resulting from their neglect or refusal to comply with the provisions of section 1 of this act. [L. '81, p. 165, §2; G. S. '83, p. 566, §1737.

An Act in relation to irrigation; prescribing certain penalties in relation thereto, and defining certain duties of the state engineer and superintendents of irrigation.—*Approved April* 13, 1901. *In force July* 13, 1901. L. '01, p. 193, ch. 85.

§ 486. (2286*a*) Erect Headgate and Flume—Failure.

Whenever any owner or owners of any irrigation ditch, canal, flume or reservoir in this state, taking water from any stream,

shall fail to erect or maintain in good repair, at the point of intake of such ditch, canal, flume or reservoir, a suitable and proper headgate, and measuring flume or weirs, together with the necessary embankments therefor, of sufficient height and strength to control the water at all ordinary stages, with a frame work constructed of timber not less than four inches square, at the bottom, sides and gate or gates of plank not less than two inches in thickness, then the state engineer or superintendent of irrigation shall, upon ten days' previous notice in writing duly served upon the owner or owners of such irrigation ditch, canal, flume or reservoir, or upon any agent or employee representing or controlling the same, refuse to deliver to such owner or owners of such irrigating ditch, canal, flume or reservoir, any water from such stream, until such owner or owners shall cause to be erected or repaired the headgate, headgates or measuring flumes of such ditch, canal, flume or reservoir. [L. '01, p. 193, §1.

§ 487. (2286*b*) Erect Headgate and Flume—Failure.

Whenever the owner or owners of any irrigation ditch, canal or reservoir transferring water from one public stream to another, or from a reservoir, ditch or flume to a stream, in order that the same may be diverted therefrom for irrigation or any other purposes, shall fail and neglect to construct suitable and proper measuring flumes or weirs for the proper and accurate determination of the amount and volume of water turned into, carried through and diverted out of said public stream, then the state engineer or the superintendent of irrigation shall, upon five days' previous notice in writing duly served upon the owner or owners of any such irrigation ditch, canal or reservoir, or agent or employee thereof, so transferring water from one public stream to another, or from any ditch, canal or reservoir to a public stream for conveyance therethrough, refuse to allow to be taken and diverted therefrom, any water whatever on account of delivery of water thereto, for such time and until such owner or owners shall cause to be erected or repaired such flumes or weirs at the point of delivery to and taking from said public stream so used as a conduit. [L. '01, p. 194, §2.

§ 488. (2286*c*) Rating Tables.

The state engineer or superintendent of irrigation shall rate the measuring flumes and weirs referred to in sections 1 and 2 of this act, and shall supply the superintendent of the division and the water commissioner of the district in which such measuring flumes or weirs are located, with a rating table, which shall be used by them in measuring water flowing to and from such public stream. [L. '01, p. 194, §3.

§ 489. (2286*d*) Owners Not Impound Water—Gauge Rod Maintained.

The owners or possessors of reservoirs shall not have the right to impound any water whatever in such reservoir during the time that such water is required in ditches for direct irrigation or for reservoirs holding senior rights. A gauge rod shall be permanently fixed and maintained at the outlets of said reservoirs, and if any owner or possessor of any reservoir shall fail or refuse within thirty days after this act goes into effect, to pro-

vide, fix and maintain such gauge rod or rods, as aforesaid, then and in that event the owner or possessor of such reservoir shall not be entitled to impound any water whatever in said reservoir or reservoirs until the provisions of this section are fully complied with. [L. '01, pp. 194-195, §4.

§ 490. (2286e) Control Headgates, etc.

All headgates and measuring weirs used in connection with canals, flumes, ditches and reservoirs for the measuring and delivery of water therefrom and thereto, shall be under the supervision and control at all times of the state engineer, the superintendent of irrigation of the water division and the water commissioner of the water district wherein such headgate and measuring weirs are located. [L. '01, p. 195, §5.

§ 491. (2286f) Survey—Table of Capacity—Measure Water.

The owner or owners of any reservoir situate upon or in the bed of any natural stream or through which any natural stream runs, for the purpose of storing water to be diverted at a point further down said stream, shall, at the expense of the owner or owners, cause a complete survey of the contour lines of said reservoir to be made by the state engineer, and it shall be the duty of the state engineer to make such survey upon the request of the owner, which said contour lines shall be ascertained for at least every vertical foot in depth, and, in all cases where deemed necessary by the state engineer, for fractions of a foot; and a table to be prepared showing the number of cubic feet, capacity of said reservoir for each foot in depth and fraction thereof; and a gauge rod placed in said reservoir, marked in correspondence with said contour line from which the amount of water stored in, or taken from, said reservoir, may be ascertained. And in case of failure so to do, the said state engineer or superintendent of irrigation shall refuse to be allowed to be taken into, or diverted from, said reservoir, any water whatever; Provided, however, That in all cases where for any reason said state engineer may find it impracticable to make said survey, the said owner or owners of said reservoir may continue to store and deliver water upon providing a suitable and proper measuring flume or weir for the accurate ascertainment of the amount of water discharged from said reservoir. [L. '01, p. 195, §6.

§ 492. (2286g) Repeal.

All acts and parts of acts inconsistent herewith are hereby repealed. [L. '01, p. 196, §7.

§ 493. (2287) Irrigation Season—When Water to be Kept Flowing in Ditches—Proviso.

Every person or company owning or controlling any canal or ditch used for the purposes of irrigation and carrying water for pay, shall, when demanded by the users during the time from April 1, until November 1, in each year, keep a flow of water therein, so far as may be reasonably practical for the purpose of irrigation, sufficient to meet the requirements of all such persons as are properly entitled to the use of water therefrom, to the

extent, if necessary, to which such person may be entitled to water, and no more; Provided, however, That whenever the rivers, or public streams or sources from which the water is obtained are not sufficiently free from ice, or the volume of water therein is too low and inadequate for that purpose, then such canal or ditch shall be kept with as full a flow of water therein as may be practicable, subject, however, to the rights of priorities from the streams or other sources, as provided by law, and the necessity of cleaning, repairing and maintaining the same in good condition. [L. '93, p. 299, §1.

§ 494. (2288) Ditches to be Kept in Repair—Outlets.

The owners, or persons in control, of any canal or ditch used for irrigating purposes, shall maintain the same in good order and repair, ready to receive water by April 15, in each year, so far as can be accomplished by the exercise of reasonable care and diligence, and shall construct the necessary outlets in the banks of the canal or ditch for a proper delivery of the water to persons having paid-up shares, or who have rights to the use of water; Provided, however, That a multiplicity of outlets in the canal or ditch shall at all times be avoided, so far as the same shall be reasonably practicable, and the location of the same shall be under the control of, and shall be at the most convenient and practicable points consistent with the protection and safety of the ditch for the distribution of water among the various claimants thereof; and such location shall be under the control of a superintendent. [L. '87, p. 305, §2.

§ 495. (2289) Superintendent to Measure Water.

It shall be the duty of those owning or controlling such canals or ditches, to appoint a superintendent, whose duty it shall be to measure the water from such canal or ditch through the outlets, to those entitled thereto according to his or her *pro rata* share. [L. '87, p. 305, §3.

§ 496. (2290) Penalty for Refusal or Neglect to Deliver Water.

Any superintendent, or any person having charge of the said ditch, who shall willfully neglect or refuse to deliver water, as in this act provided, or any person or persons who shall prevent or interfere with the proper delivery of water to the person or persons having the right thereto, shall be guilty of a misdemeanor, and upon conviction thereof shall be subject to a fine of not less than ten nor more than one hundred dollars for each offense, or imprisonment not exceeding one month, or by both such fine and imprisonment; and the money thus collected shall be paid into the general fund of the county in which the misdemeanor has been committed; and the owner or owners of such ditches shall be liable in damages to the person or persons deprived of the use of the water to which they were entitled as in this act provided. [L. '87, p. 305, §4.

§ 497. (2291) Water Commissioner to Promptly Measure Water.

Any water commissioner, or his deputy, or assistant, who shall willfully neglect or refuse, after being called upon in accordance

with section 1758 of the general statutes of the state, to promptly measure water from the stream, or other source of supply, into the irrigating canals or ditches, in his district according to their respective priorities, to the extent to which water may be actually necessary for the irrigation of lands under such canals or ditches, shall be deemed guilty of a misdemeanor, and shall be subject to the same penalty as provided in section 4 of this act. [L. '87, p. 305, §5.

§ 498. (2292) Duties of Justices of the Peace.

In all cases declared misdemeanors by this Act, any justice of the peace of the county in which the offense was committed, may, upon complaint being made, as is now required by law, issue a warrant directed to any proper officer of the county for the arrest of any person so charged with any such misdemeanor, and upon the arrest of such person or persons, the justice of the peace before whom such person or persons may be brought for trial, shall hear and determine the cause, and if he find the accused guilty, shall assess the fine, and if imprisonment be a portion of the sentence, then to fix the term of imprisonment, or both, as provided in section 4 of this act; Provided, The accused may have a trial by jury which shall be summoned as in cases before justices of the peace for assault and battery. [L. '87, p. 306, §6.

An Act to provide for erecting headgates, waste-gates, locks, fastenings, and paying the expenses thereof.—*Approved April* 17, 1889. *In force April* 17, 1889. L. '89, p. 161.

§ 499. (2293) Erect and Maintain Headgates.

All persons, associations or corporations who have heretofore or who may hereafter divert water for purposes of irrigation from any of the public streams of the state, shall erect and maintain headgates and waste-gates in connection therewith, and in case of failure or neglect, or refusal to do so, after five days' notice has been given by the water commissioner or state engineer, then said headgates shall be constructed by the water commissioner of the district within which said ditch, canal or conduit may be located, and if, upon demand, the owner or owners of said ditch, canal or conduit shall neglect or refuse to pay the expenses thereof, then the said water commissioner shall take such proceedings to recover the same as is now provided for by sections 1730, 1731 and 1732 of the general statutes of 1883, in the case of failure to build and maintain bridges. [L. '89, p. 161, §1.

§ 500. (2294) Keep Suitable Locks and Fastenings on Headgates.

All persons, associations or corporations shall put and keep suitable locks and fastenings on their headgates, where water is conducted from the public streams or heads of supply, and if said persons, associations or corporations refuse or neglect to provide locks and suitable fastenings for said headgates, after five days' notice by the water commissioner of the district, or by the state engineer, it is made the duty of the water commissioner of the water district, and its superintendent, to provide

suitable locks and fastenings, and if the owner or owners of said ditch, canal or conduit shall neglect or refuse to pay the expenses thereof, the water commissioner shall take such proceedings to recover the same as are provided in section 1 of this act; the keys of said locks to be under the control, and in possession of the water commissioner of the district during the season of irrigation or domestic distribution of water. [L. '89, p. 161, §2.

DIVISION III.—RATES OF CHARGES FOR WATER.

An Act to regulate the use of water for irrigation, and providing for settling the priority of right thereto, and for payment of the expenses thereof, and for payment of all costs and expenses incident to said regulation of use.—*Approved February* 19, 1879. *In force February* 19, 1879. L. '79, p. 95, etc.

§ 501. (2295) Regulating Charges—Petition—Affidavits—Proceedings Before Commissioners—Notice—Service—Evidence—Depositions.

The county commissioners of each county shall, at their regular January session in each year, hear and consider any and all applications which may be made to them by any party or parties interested in procuring water for irrigation by purchase from any ditch or reservoir furnishing and selling water, or proposing to furnish water for sale, the whole or upper part of which shall lie in such county, which application shall be supported by such affidavit or affidavits as the applicant may see proper to present, showing reasonable cause for such board to proceed to fix the price of water to be thereafter sold from such ditch or reservoir, and [if] such board of commissioners shall, upon examination of such affidavit or affidavits, or from the oaths of witnesses in addition thereto, find that the facts sworn to show the application to be in good faith, and that there is reasonable grounds to believe that unjust prices are, or are likely to be, charged for water from such ditch or reservoir, they shall enter an order fixing a day, not sooner than forty days thereafter, nor later than the third day of the [next] regular session of their board, when they will hear all parties directly or indirectly interested in said ditch or reservoir, or in procuring water therefrom for irrigation, who may appear, as well as all testimony by witnesses, or depositions taken on notices as hereinafter provided, touching the said ditch or reservoir, and the cost of furnishing water therefrom, at which time all persons or corporations interested in said ditch or reservoir, as well as all interested in obtaining water therefrom, or in lands which may be irrigated therefrom, may appear by themselves, their agents or attorneys, and said commissioners shall then proceed to take action in the matter of fixing such price of water, provided the applicant shall, within ten days from the time of entering such order, cause a copy thereof, duly certified, to be delivered to the owner of such ditch or reservoir, if it be owned by one person, or each of the owners, if it be owned by several persons, or to the president, secretary or treasurer of the company, if it belongs to a corporation or association having such officers, or if such owner can not be found, he shall cause such copy to be left at his usual place of residence,

with some person or member of his family residing there, and over fourteen years of age, and if such ditch officer can not be found, he shall cause such copy to be left at the office or place of business of the company of which he is such officer, or at his residence, if such company have no place of business, and if such ditch is owned by several owners, not an incorporated company, it shall be sufficient to serve such notice by delivering one such copy each to a majority of them, and such applicant shall make affidavit of the manner in which such copy or copies have been served. Depositions mentioned in section 1 hereof, to be used before said commissioners, shall be taken before any officer in the state authorized by law to take depositions, upon reasonable notice being given to the opposite party of the time and place of taking such depositions. [L. '79, pp. 94-96, §1; G. S. '83, pp. 566, 567, §1738.

§ 502. (2296) Powers and Duties of Board—Subpœnas—Compulsion—Adjournments—Examination — Facts — Order — Proviso as to Contracts.

Said board shall hear and examine all legal testimony or proofs offered by any of the parties interested as before mentioned, as well concerning the value of the construction of such ditch or reservoir as the cost and expense of maintaining and operating the same, and all matters which may affect the just price and value of water to be furnished therefrom; and they shall have power to issue subpœnas to witnesses and compel their attendance, which subpœnas shall be served by the sheriff of the proper county when required; and also to compel the production of books and papers required for evidence in as full and ample a manner as the district court now has. They may adjourn the hearing from time to time to further the ends of justice or suit the general convenience of parties. Upon hearing an [and] considering all the matters and facts involved in the case, the board of commissioners shall enter an order naming and describing the ditch or reservoir with sufficient certainty, and fixing a just price upon all water to be thereafter sold, which price shall not be thereafter changed oftener than once in two years; Provided, That no price so fixed shall effect [affect] the rights of parties, or their lawful assignees or grantees, who may have contracts with the company, association or person owning such ditch or reservoir, or their lessees, grantees or successors, nor the rights of such owners lessees or grantees under such contract, nor shall it in any way affect or hinder the making of such contract. [L. '79, p. 96, §2; G. S. '83, pp. 567, 568, §1739.

§ 503. (2297) Right to Continue Purchasing Water—Tender of Price—Stockholders—Rights.

Any person or persons, acting jointly, or severally, who shall have purchased and used water for irrigation for lands occupied by him, her or them, from any ditch or reservoir, and shall not have ceased to do so for the purpose or with intent to procure water from some other source of supply, shall have a right to continue to purchase water to the same amount for his, her or their lands, on paying or tendering the price thereof, fixed by the county commissioners as above provided, or, if no price

shall have been fixed by them, the price at which the owners of such ditch or reservoir may be then selling water, or did sell water during the then last preceding year. This section shall not apply to the case of those who may have taken water as stockholders or shareholders after they shall have sold or forfeited their shares or stock, unless they shall have retained a right to procure such water by contract, agreement or understanding, and use between themselves and the owners of such ditch, and not then to the injury of other purchasers of water from or shareholders in [the] same ditch. [L. '79, pp. 96, 97, §3; G. S. '83, p. 568, §1740.

An Act to regulate the mode of fixing the rates of compensation by boards of county commissioners, for water furnished and delivered for irrigation had other lawful purposes, from ditches, canals, conduits and reservoirs; and to repeal laws inconsistent therewith, and punish offenses contrary thereto.—*Approved April* 4, 1887. *In force April* 4, 1887. L. '87, p. 291.

§ 504. (2298) County Commissioners Hear and Consider Applications.

The county commissioners of each county shall, at their regular sessions in each year, and at such other sessions as they in their discretion may deem proper, in view of the irrigation and harvesting season, and the convenience of all parties interested, hear and consider all applications which may be made to them by any party or parties interested, either in furnishing and delivering for compensation in any manner, or in procuring for a such compensation, water for irrigation, mining, milling, manufacturing, or domestic purposes, from any ditch, canal, conduit or reservoir, the whole or any part of which shall lie in such county. Which application shall be supported by such affidavits as the applicant or applicants may present, showing reasonable cause for such board of county commissioners to proceed to fix a reasonable maximum rate of compensation for water to be thereafter delivered from such ditch, canal, conduit or reservoir, within such county. [L. '87, p. 291, §1.

§ 505. (2299) Commissioners Appoint Day for Hearing Parties Interested in Ditches, etc.

Every such board of commissioners shall, upon examination of such affidavit or affidavits, or from the oaths of witnesses in addition thereto, if they find that the facts sworn to show the application to be in good faith, and that there are reasonable grounds to believe that unjust rates of compensation are, or are likely to be, charged or demanded for water from such ditch, canal, conduit or reservoir, shall enter an order fixing a day not sooner than twenty days thereafter, nor later than the third day of the next regular session of their board, when they will hear all parties interested in such ditch, or other water-works as aforesaid, or in procuring water therefrom, for any of the said uses, as well as all documentary or oral evidence or depositions, taken according to law, touching the said ditch, or other work as aforesaid, and the cost of furnishing water therefrom. [L. '87, p. 292, §2.

§ 506. (2300) Commissioners Fix Rates—Proviso.

At the time so fixed, all persons interested as aforesaid, on either side of the controversy, in lands which may be irrigated from such ditch, or other work aforesaid, may appear by themselves, their agents, or attorneys, and said commissioners shall then proceed to take action in the matter of fixing such rates of compensation for the delivery of water: Provided, The applicant or applicants (if the application be made by a party or parties as aforesaid desirous of procuring water), shall, within ten days from the time of entering the said order fixing the hearing, cause a copy of such order duly certified, to be delivered to the owner, or owners, of such ditch, canal, conduit, or reservoir, or to the president, secretary, or treasurer of the company, if it be owned by a corporation or association, having such officers. If any such owner can not be found, a copy shall be left at his usual place of abode, with some person residing there, over twelve years of age; and if such officer of any corporation or association cannot be found, such copy shall be left at the usual place of business of the company of which he is such officer, or at his residence if such company have no place of business, and if such ditch, or other work aforesaid, shall be owned by several owners not being an incorporated company, it shall be sufficient to serve such notice by delivering copies to a majority of them. If the applicant be the owner or party controlling such ditch, canal, conduit, or reservoir, such notice shall be given by causing printed copies of such order in hand-bill form, in conspicuous type, to be posted securely in ten or more public places throughout the district watered from such ditch, or other work aforesaid (if the water be used for irrigation), and one copy shall be posted for every mile in length of such ditch; but if such ditch, or other work, be for the supply of water for milling or mining, it shall be sufficient to serve such copy on the parties then taking water therefrom. The person or persons making such service or posting such printed copies, shall make affidavit of the manner in which the same has been done, which affidavit shall be filed with the said board of county commissioners. Depositions mentioned in section 2 hereof, to be used before said commissioners, shall be taken before any officer in the state authorized by law to take depositions, upon reasonable notice being given to the opposite party of the time and place of taking the same. [L. '87, p. 292, §3.

§ 507. (2301) Commissioners May Postpone Hearing—Witnesses —Subpœnas—Court Compel Obedience.

Said board of commissioners may adjourn or postpone any hearing from time to time as may be found necessary, or for the convenience of parties, or of public business; and they shall hear and examine all legal testimony or proofs offered by any party interested as aforesaid, as well concerning the original cost and present value of works and structure of such ditch, canal, conduit or reservoir, as the cost and expense of maintaining and operating the same, and all matters which may affect the establishing of a reasonable maximum rate of compensation for water to be furnished and delivered therefrom; and they may issue subpœnas for witnesses, which subpœnas shall be served by the

sheriff of the county, who shall receive the lawful fees for all such service; and said board may also issue a subpœna for the production of all books and papers required for evidence before them. Upon hearing and considering all the evidence and facts, and matters involved in the case, said board of commissioners shall enter an order describing the ditch, canal, conduit, reservoir, or other work in question, with sufficient certainty, and fixing a just and reasonable maximum rate of compensation for water to be thereafter delivered from such ditch or other work as last aforesaid, within the county in which such commissioners act, and such rate shall not be changed within two years from the time when they shall be so fixed, unless upon good cause shown. The district court of the proper county, or the judge thereof in vacation, may, in case of refusal to obey the subpœna of the board of county commissioners, compel obedience thereto, or punish for refusal to obey, after hearing, as in cases of attachment, for contempt of such district court. [L. '87, p. 293, §4.

§ 508. (2302) False Swearing.

Every person who shall swear or affirm falsely in any matter, or testify falsely after being duly sworn or having affirmed as a witness in any proceeding provided for in this act, shall be deemed guilty of perjury, and on conviction shall be punished accordingly. [L. '87, p. 294, §5.

§ 509. (2303) Repeal.

All acts and parts of acts inconsistent with the provisions of this act are hereby repealed, but such repeal shall not work any interference with any proceeding by any board of county commissioners now pending, saving that any such proceeding may, at the request of either party, be carried on to completion under the provisions hereof. [L. '87, p. 294, §6.

ANTI-ROYALTY ACT.

An Act to define, prohibit, punish and restrain extortion and other abuses in the management of ditches, canals, and reservoirs.—*Approved April* 4, 1887. *In force July* 4, 1887. L. '87, p. 308.

§ 510. (2304) Royalties Prohibited—Illegal Rate—Excess Recovered—Costs.

It shall not be lawful for any person owning or controlling, or claiming to own or control any ditch, canal, or reservoir, carrying or storing, or designed for the carrying or storing of any water taken from any natural stream or lake within this state, to be furnished or delivered for compensation for irrigation, mining, milling, or domestic purposes, to persons not interested in such ownership, or control, to demand, bargain for, accept, or receive, from any person who may apply for water for any of the aforesaid purposes, any money, or other valuable thing whatsoever, or any promise or agreement therefor, directly or indirectly, as royalty, *bonus*, premium prerequisite or condition precedent to the right or privilege of applying, or bargaining for, or

procuring, such water. But such water shall be furnished, carried, and delivered upon payment or tender of the charges fixed by the county commissioners of the proper county, as is, or may be, provided by law. Any and all moneys, and every valuable thing, or consideration of whatsoever kind, which shall be so, as aforesaid, demanded, charged, bargained for, accepted, received, or retained, contrary to the provisions of this section, shall be deemed and held an additional and corrupt rate, charge, or consideration for the water intended to be furnished or delivered therefor, or because thereof, and wholly extortionate and illegal; and when paid, delivered, or surrendered, may be recovered back by the party paying, delivering, or surrendering the same from the party to whom, or for whose use, the same shall have been paid, delivered, or surrendered, together with costs of suit, including forfeiture of the corporate rights, privileges and franchises of any such corporation so offending, or by *mandamus* or other proper proceedings to compel it to its duty in that behalf. [L. '87, p. 310, §4.

§ 511. (2305) Penalty for Collecting Excessive Rates.

Every person owning or controlling, or claiming to own or control, any ditch, canal or reservoir, such as is mentioned in the first section of this act, who shall after demand in writing made upon him for the supply or delivery of water for irrigation, mining, milling or domestic purposes, to be delivered from the canal, ditch or reservoir, owned, possessed or controlled by him, and after tender of the lawful rate of compensation therefor, in lawful money, demand, require, bargain for, accept, receive or retain from the party making such application, any money or other thing of value, or any promise or contract, or any valuable consideration whatever, as such royalty, *bonus*, premium, prerequisite or condition precedent, as is by the provisions of this said first section prohibited, shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be punished by fine of not less than one hundred dollars, nor more than five thousand dollars, or imprisonment for a term not less than three months nor more than one year, or both such fine and imprisonment, in the discretion of the court. [L. '87, p. 309, §2.

§ 512. (2306) Refusal to Deliver Water—Penalty.

Every person owning or controlling, or claiming to own or control, any ditch, canal or reservoir, such as is mentioned in the first section of this act, who shall, after demand in writing, made upon him for the supply or delivery of water for irrigation, mining, milling, or domestic purposes, to be delivered from the canal, ditch or reservoir, owned, possessed or controlled by him, and after tender of the lawful rate of compensation therefor, in lawful money, refuse to furnish or carry and deliver from such ditch, canal or reservoir, any water so applied for, which water can or may be by use of reasonable diligence in that behalf, and within the carrying or storage capacity of such ditch, canal or reservoir, be lawfully furnished and delivered, without infringement of prior rights, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be punished by fine of not less than one hundred dollars, nor more than five thousand dollars, or im-

prisonment for a term of not less than three months, nor more than one year, or both such fine and imprisonment, in the discretion of the court. [L. '87, p. 309, §3.

§ 513. (2307) When Corporation Refuses to Deliver Water—Attorney-General Prosecute.

When any corporation, in defiance or by attempted evasion of the provisions of this act, shall, after tender of the compensation hereinbefore provided for, refuse to deliver water, such as is mentioned in the third section of this act, to any person lawfully entitled to apply therefor, it shall be the duty of the attorney-general, upon request of the county commissioners of the proper county, or upon his otherwise receiving due notice thereof, to institute and prosecute to judgment and final determination proceedings in *quo warranto*, for the forfeiture of the corporate rights, privileges and franchises of any such corporation so offending, or by *mandamus* or other proper proceedings to compel it to its duty in that behalf. [L. '87, p. 310, §4.

§ 514. (2308) "Person" Defined—Liability.

The word "person," as used in this act, shall include corporations and associations, and the plural as well as the singular number. And every officer of a corporation, or member of an association or co-ownership, and every agent violating any of the provisions of this act, shall be liable to restore the unlawful consideration extorted, and be punishable under the penal provisions of this act, the same as if the thing done in disobedience to its provisions were done for his own sole benefit and advantage. [L. '87, p. 310, §5.

§ 515. (2309) Repeal.

All laws and parts of laws in conflict with any of the provisions of this act, are hereby repealed. [L. '87, p. 310, §6.

DIVISION III*a*. INCORPORATED IRRIGATION DISTRICTS —"WRIGHT ACT."

An Act in relation to irrigation districts.—*Approved May* 3, 1905. *In force May* 3, 1905. L. '05, p. 246-274, ch. 113, to be §§2309*a*-2309*d* 2, of next ed. of 3 Mills' Ann. St.

§ 516. (1) Organization of Irrigation Districts—Ditches Exempt.

Whenever a majority of the resident freeholders owning lands in any district desire to provide for the irrigation of the same they may propose the organization of an irrigation district under the provisions of this act, and when so organized each district shall have the powers conferred or that may hereafter be conferred by law upon such irrigation district; Provided, That where ditches, canals or reservoirs have been constructed before the passage of this act, such ditches, canals, reservoirs and franchises, and the lands watered thereby, shall be exempt from the operation of this law, except such district shall be formed to purchase, acquire, lease or rent such ditches, canals, reservoirs and their franchises. [L. '05, p. 246, §1.

§ 517. (2) Petition for Organization—Contents—Majority of Freeholders—Bond.

For the purpose of the establishment of an irrigation district as provided by this act, a petition shall be filed with the board of county commissioners of the county which embraces the largest acreage of the proposed district; said petition shall state that it is the purpose of petitioners to organize an irrigation district, under the provisions of this act; said petition shall also contain a general description of the boundaries of such proposed district, the means proposed to supply water for the irrigation of the lands embraced therein, the name proposed for such district, and shall select a committee of three of said petitioners to present such petition to the board of county commissioners as provided by law, praying that the said board define and establish the boundaries of said proposed district and submit the question of the final organization of the same to the vote of the qualified electors resident within said proposed district; said petition shall be signed by a majority of the resident freeholders within said proposed district, and who shall also be the owners in the aggregate of a majority of the whole number of acres belonging to the resident freeholders within the said proposed district. The said petition shall also be accompanied by a good and sufficient bond, to be approved by said board of county commissioners in double the amount of the probable cost of organizing such district, conditioned for the payment of all costs incurred in said proceedings in case said organization shall not be effected, but in case such district is so effected, then said expenses incurred by the board of county commissioners shall be paid back to said county by said district. Such petition shall be published for at least two weeks before the time at which the same is to be presented, in some newspaper of general circulation printed and published in the county where said petition is to be presented, together with a notice signed by the committee of said petitioners selected by the petition for that purpose giving the time and place of the presentation of the same to said board of county commissioners. [L. '05, pp. 246-7, §2.

§ 518. (3) Allowance of Petition—Boundaries Defined—Land Included and Excluded—Application—Election—Judges—Directors—Denial of Petition—Reasons—Writ of Mandamus Issued When—Officers.

When such petition is presented and it shall appear that the notice of the presentation of said petition has been given as required by law, and that said petition has been signed by the requisite number of petitioners as required by this act, the commissioners shall then proceed to define the boundaries of said proposed district from said petition and from such applications for the exclusion of lands therefrom and the inclusion of lands therein as may be made in accordance with the intent of this act; they may adjourn such examination from time to time not exceeding three weeks in all and shall by final order duly entered define and establish the boundaries of such proposed district; Provided, That said board shall not modify such proposed boundaries described in the petition so as to change the objects of said petition or so as to exempt from the operation of this act any

land within the boundaries proposed by the petition susceptible to irrigation by the same system of water works applicable to other lands in such proposed district; nor shall any land which will not in the judgment of the board be benefited by such proposed system be included in such district if the owner thereof shall make application at such hearing to withdraw the same, Provided, also, That contiguous lands not included in said proposed district as described in the petition may upon application of the owner or owners be included in such district upon such hearing.

When the boundaries of any proposed district shall have been examined and defined as aforesaid the county commissioners shall forthwith make an order allowing the prayer of said petition, defining and establishing the boundaries and designating the name of such proposed district. Thereupon the said commissioners shall by further order duly entered upon their record call an election of the qualified electors of said district to be held for the purpose of determining whether such district shall be organized under the conditions of this act, and by such order shall submit the names of one or more persons from each of the three divisions of said district as hereinafter provided to be voted for as directors therein, and for the purposes of said election shall divide said district into three divisions as nearly equal in size as may be practicable and shall provide that a qualified elector of each of said three divisions shall be elected as a member of the board of directors of said district by the qualified electors of the whole district. Each of said divisions shall constitute an election precinct and three judges shall be appointed for each of such precincts, one of whom shall act as clerk of said election; Provided, That in the hearing of any such petition the board of county commissioners shall disregard any informality therein, and in case they deny the same or dismiss it for any reasons on account of the provisions of this act not having been complied with, which are the only reasons upon which they shall have a right to refuse or dismiss the same, they shall state their reasons in writing therefor in detail, which shall be entered upon their records and in case these reasons are not well founded, a writ of mandamus shall, upon proper application therefor, issue out of the district court of said county, compelling them to act in compliance with this act, which writ shall be heard within twenty days from the date of its issuance, and which twenty days shall be excluded from the forty days given the commissioners herein to act upon said petition. The officers of such district shall consist of three directors, a secretary and treasurer. [L., '05 p. 247-9, §3.

§ 519. (4) Notice—Election.

The board of county commissioners shall thereupon cause a notice embodying said orders in substance signed by the chairman of the board of county commissioners and the clerk of said board to be issued, given and published, giving public notice of said election, the time and places thereof, the matters submitted to the vote of the electors; said notice and order shall be published once a week for at least three weeks prior to such election in a newspaper of general circulation in said county, and if any portion of such proposed district lies within any other county or

counties, then such order and notice shall be published in a newspaper of general circulation published within each of said counties. At said election and all elections held under the provisions of this act, all persons who are qualified electors within said proposed district and are resident freeholders and shall have paid a property tax in said proposed district during the year preceding such election shall be entitled to vote, and none others. The ballots to be used and cast at such election for the formation of such district shall be substantially as follows: "Irrigation District—Yes," or "Irrigation District—No," or words equivalent thereto, and shall also contain the names of the persons to be voted for as members of the board of directors of said district; each elector may vote for three directors, one from each division, and shall indicate his vote by placing a marginal cross upon the ballot for or against any question submitted or name voted upon and opposite thereto at any election held under this act. [L. '05, p. 249, §4.

§ 520. (5) Election—Canvass of Votes—Proclamation—Election Precincts—Judges.

The said board of county commissioners shall meet on the second Monday next succeeding such election and proceed to canvass the votes cast thereat; and if, upon such canvass, it appears that at least a majority of said legal electors in said district have voted "Irrigation District—Yes," the said board shall, by an order entered on their minutes, declare such territory duly organized as an irrigation district, under the name and style theretofore designated, and shall declare the persons receiving, respectively, the highest number of votes for such several offices, to be duly elected to such office. Said board shall cause a copy of such order, including a plat of said district, duly certified by the clerk of the board of county commissioners, to be immediately filed for record in the office of the county clerk of each county in which any portion of such lands are situated, and no board of county commissioners of any county, including any portion of such district, shall, after the date of organization of such district, allow another district to be formed, including any of the lands of such district, without the consent of the board of directors thereof; and from and after the date of such filing, the organization of such district shall be complete, and the officers thereof shall immediately enter upon the duties of their respective offices, upon qualifying in accordance with law, and shall hold such offices, respectively, until their successors are elected and qualified. For the purpose of the election above provided for, the said board of county commissioners must establish a convenient number of election precincts and polling places in said proposed district, and define the boundaries thereof, which said precincts may thereafter be changed by the board of directors of such districts, and shall also appoint the judges of election for each such precinct, one of whom shall act as clerk of election. [L. '05, pp. 249-50, §5.

§ 521. (6) Officers—Election—Bond.

The regular election of said district shall be held on the first Tuesday after the first Monday in December in each second calendar year thereafter, at which said officers shall be elected

The person receiving the highest number of votes for any office to be filled at such election is elected thereto. Within ten days after receiving their certificates of election, hereinafter provided for, said officers shall take and subscribe the official oath and file the same in the office of the county clerk of the county where the organization was effected, and thereupon immediately assume the duties of their respective offices. Each member of said board of directors shall execute an official bond in the sum of three thousand dollars ($3,000), which bond shall be approved by the judge of the county court of said county where such organization was effected, and shall be recorded in the office of the county clerk thereof. All official bonds herein provided for shall be in form prescribed by law for official bonds for county officers, except that the obligee named in said bond shall be to said district. [L. '05, pp. 251-2, §6.

§ 522. (7) Officers—Election Notice—Vacancies—Time of Election.

The office of the board of directors shall be located in the county where the organization was effected. Fifteen days before any election held under this act, subsequent to the organization of the district, the secretary who shall be appointed by the board of directors shall cause notice specifying the polling places of each precinct to be posted in three public places in each election precinct, of the time and place of holding the election, and shall also post a general notice of the same in the office of said board, which shall be established and kept at some fixed place to be determined by said board in said county. Prior to the time for posting the notices, the board must appoint from each precinct, from the electors thereof, three judges, one of whom shall act as clerk, who shall constitute a board of election for such precinct. If the board fails to appoint a board of election, or the members appointed do not attend the opening of polls on the morning of election, the electors of the precinct present at that hour may appoint the board, or supply the place of an absent member thereof. The board of directors must, in its order appointing the board of election, designate the hour and the place in the precinct where the election must be held. [L. '05, p. 251, §7.

§ 523. (8) Officers—Election Officers' Duties.

One of the judges shall be chairman of the election board and may: First, administer all oaths required in the progress of an election. Second, appoint judges and clerks, if during the progress of the election any judge or clerk ceases to act. Any member of the board of election, or any clerk thereof, may administer and certify oaths required to be administered during the progress of an election. Before opening the polls, each member of the board must take and subscribe an oath to faithfully perform the duties imposed upon them by law. Any elector of the precinct may administer and certify such oath. The polls must be opened at eight o'clock in the morning of election and be kept open until six o'clock p. m. of the same day. It shall be the duty of the clerk of the board of election to forthwith deliver the returns duly certified to the board of directors of the district. [L. '05, pp. 251-2, §8.

§ 524. (9) Officers—Canvass of Votes.

No lists, tally paper, or certificates returned from any election shall be set aside or rejected for want of form if it can be satisfactorily understood. The board of directors must meet at its usual place of meeting on the first Monday after election and canvass the returns. If at the time of meeting the returns from each precinct in the district in which the polls were open have been received, the board of directors must then and there proceed to canvass the returns; but if all the returns have not been received, the canvass must be postponed from day to day until the returns have been received, or until six postponements have been had. The canvass must be made in public and by opening the returns and counting the votes of the district for each person voted for, and declaring the results thereof. The board shall declare elected the person receiving the highest number of votes so returned for each office, and also declare the result of any question submitted. [L. '05, p. 252, §9.

§ 525. (10) Officers—Records—Vacancy and Term of Office.

The secretary of the board of directors must, as soon as the result of any election held under the provisions of this act is declared, enter in the records of such board and file with the county clerk of the county in which the office of said district is located, a statement of such results, which statement must show: First, a copy of the publication notice of said election. Second, the names of the judges of said election. Third, the whole number of votes cast in the district and in each precinct of the district. Fourth, the names of the persons voted for. Fifth, the office to fill which each person was voted for. Sixth, the number of votes given in each precinct for each of such persons. Seventh, the number of votes given in the district for each of such persons. Eighth, the names of the persons declared elected. Ninth, the result declared on any question submitted in accordance with the majority of the votes cast for or against such question. The board of directors must declare elected the person having the highest number of votes given for each office, and also the result of any question submitted. The secretary must immediately make out and deliver to such person a certificate of election, signed by him and authenticated with the seal of the board. In case of a vacancy in the board of directors, by death, removal, or inability from any cause, to properly discharge the duties as such director, the vacancy shall be filled by appointment by the remaining members of the board, and upon their failure or inability to act within thirty days after such vacancy occurs, then upon petition of five electors of said district the board of county commissioners of the county where the office of said board of directors is situate, shall fill such vacancy or vacancies. Any director appointed as above provided shall hold his office until the next general election of said district, and until his successor is elected and qualified. [L. '05, pp. 252-3, §10.

§ 526. (11) Board of Directors—Officers—General Duties and Powers—Ratio of Water Distribution—Rental.

The directors, having duly qualified, shall organize as a board, elect a president from their number, and appoint a secretary.

The board shall have power, and it shall be their duty, to adopt a seal, manage and conduct the affairs and business of the district, make and execute all necessary contracts, employ such agents, attorneys, officers and employees as may be required, and prescribe their duties, establish equitable rules and regulations for the distribution and use of water among the owners of said land, and generally to perform all such acts as shall be necessary to fully carry out the purposes of this act. Said board shall have the power in addition to the means to supply water to said district proposed by the petition submitted for the formation of said district, to construct, acquire or purchase any and all canals, ditches, reservoirs, reservoir sites, water, water rights, rights of way, or other property necessary for the use of the district. In case of the purchase of any property by such district the bonds of the district hereinafter provided for may be used at their par value in payment without previous offer of such bonds for sale. But no contract involving a consideration exceeding ten thousand ($10,000) dollars, and not exceeding twenty-five thousand ($25,000) dollars shall be binding, unless such contract shall be authorized and ratified in writing by not less than one-third of the legal electors of said district according to the number of votes cast at the last district election; nor shall any contract in excess of twenty-five thousand ($25,000) dollars be binding until such contract shall have been authorized and ratified at an election, in manner as is provided for the issue of bonds.

The said rules and regulations shall be printed in convenient form as soon as the same are adopted, for distribution in the district. All waters distributed shall be apportioned to each land owner *pro rata* to the lands assessed under this act within such district. The board of directors shall have power to lease or rent the use of water or contract for the delivery thereof to occupants of other land within or without the said district at such prices and on such terms as they deem best, provided the rental shall not be less than one and one-half times the amount of the district tax for which said land would be liable if held as a freehold, and provided further no vested or prescriptive right to the use of such water shall attach to said land by virtue of such lease or such rental, provided that any land owner in said district may with the consent of the board of directors assign the right to the whole or any portion of the water so apportioned to him for any one year where practicable to any other *bona fide* land owner, to be used in said district for use on his land for said year, provided such owners shall have paid all amounts due on assessments upon all such lands. [L. '05, pp. 253-4, §11.

§ 527. (12) Directors—Meetings—Duties—Domain—Public Use.

The board of directors shall hold a regular quarterly meeting in their office on the first Tuesday in January, April, July and October, and such special meeting as may be required for the proper transaction of business. All special meetings shall be called by the president of the board, or any two directors. All meetings of the board must be public, and two members shall constitute a quorum for the transaction of business; and on all questions requiring a vote there shall be a concurrence of at least two members of said board. All records of the board must be open to the inspection of any elector during business hours. The

board, its agents, and employees, shall have the right to enter upon any land in the district, to make surveys and to locate and construct any canal or canals, and the necessary laterals. Said board shall also have the right to acquire all lands, water rights, franchises and other property necessary for the construction, use, maintenance, repair, and improvement of its canals, ditches, reservoirs and water works; and shall also have the right by purchase or condemnation to acquire rights of way for the construction or enlargement of any of its ditches, canals or reservoirs, also lands for reservoir sites.]L. '05, pp. 253-4, §12.

§ 528. (13) Property—Title—Taxation.

The title to all property acquired under the provisions of this act shall immediately and by operation of law vest in such irrigation district, in its corporate name, and shall be held by such district in trust for, and is hereby dedicated and set apart for the uses and purposes set forth in this act, and shall be exempt from all taxation, and said board is hereby authorized and empowered to hold, use and acquire, manage, occupy and possess said property as herein provided; Provided, that, When any district contemplated in this act shall find it necessary to procure and acquire a supply of water from outside the boundaries of this state, then and in such event it shall be lawful for said district to contract and pay for the same in the same manner as other property acquired by the district is purchased and paid for. [L. '05, p. 255, §13.

§ 529. (14) Conveyances—Suits—Order—Judicial Notice—Evidence.

The said board is hereby authorized and empowered to take conveyances or assurances for all property acquired by it under the provisions of this act in the name of such irrigation district to and for the purposes herein expressed and to institute and maintain any and all actions and proceedings, suits at law or in equity, necessary or proper in order to fully carry out the provisions of this act or to enforce, maintain, protect, or preserve any or all rights, privileges and immuntiles created by this act or acquired in pursuance thereof. And in all courts, actions, suits, or proceedings the said board may sue, appear and defend in person or by attorneys and in the name of such irrigation district. Judicial notice shall be taken in all actions, suits and judicial proceedings in any court of this state of the organization and existence of any irrigation district of this state, now or hereafter organized, from and after the filing for record in the office of the county clerk of the certified copy of the order of the board of county commissioners mentioned in section 3 of this act; and a certified copy of said order shall be *prima facie* evidence in all actions, suits and proceedings in any court of this state of the regularity and legal sufficiency of all acts, matters and proceedings therein recited and set forth; and any such irrigation district, in regard to which any such order has been heretofore or may hereafter be entered, and such certified copy thereof, so filed for record, and which has exercised or shall exercise the rights and powers of such a district, and shall have had or shall have in office a board of directors exercising the duties of their

office and the legality or regularity of the formation or organization whereof shall not have been questioned by proceedings in *quo warranto* instituted in the district court of the county in which such district or the greater portion thereof is situated within one year from the date of such filing, shall be conclusively deemed to be a legally and regularly organized, established and existing irrigation district within the meaning of this Act; and its due and lawful formation and organization shall not thereafter be questioned in any action, suit or proceeding whether brought under the provisions of this act or otherwise. [L. '05, pp. 255-6, §14.

§ 530. (15) Bonds—Elections—Mature—Tax, Prior Lien.

For the purpose of constructing or purchasing or acquiring necessary reservoir sites, reservoirs, water rights, canals, ditches and works, and acquiring the necessary property and rights therefor, for the purpose of paying the first year's interest upon the bonds herein authorized, and otherwise carrying out the provisions of this act, the board of directors of any such district shall, as soon after such district has been organized as may be practicable, estimate and determine the amount of money necessary to be raised for such purposes, and shall forthwith call a special election, at which election shall be submitted to the electors of such district possessing the qualifications prescribed by this act the question of whether or not the bonds of said district shall be issued in the amount so determined. A notice of such election must be given by posting notices in three public places in each election precinct in said district for at least twenty days, and also by publication of such notice in some newspaper published in the county where the office of the board of directors of such district is required to be kept, once a week for at least three successive weeks. Such notice shall specify the time of holding the election, the amount of bonds proposed to be issued, and said election must be held and the result thereof determined and declared in all respects as nearly as possible in conformity with the provisions of this act governing the election of officers: Provided, That no informalities in conducting such election shall invalidate the same if the election shall have been otherwise fairly conducted. At such election the ballots shall contain the words "Bonds—Yes," or "Bonds—No," or words equivalent thereto. If a majority of the legal electors who are freeholders and taxpayers within said district have voted "Bonds—Yes" the board of directors shall immediately cause bonds in such amount to be issued and payable in series as follows, to-wit:

At the expiration of eleven years, not less than five per cent. of the whole amount and number of said bonds; at the expiration of twelve years, not less than six per cent. of the whole amount and number of said bonds; at the expiration of thirteen years, not less than seven per cent. of the whole amount and number of said bonds; at the expiration of fourteen years, not less than eight per cent. of the whole amount and number of said bonds; at the expiration of fifteen years, not less than nine per cent. of the whole amount and number of said bonds; at the expiration of sixteen years, not less than ten per cent. of the whole amount and number of said bonds; at the expiration of seventeen years, not less than eleven per cent. of the whole amount and

number of said bonds; at the expiration of eighteen years, not less than thirteen per cent. of the whole amount and number of said bonds; at the expiration of nineteen years, not less than fifteen per cent. of the whole amount and number of said bonds; at the expiration of twenty years, a percentage sufficient to pay off the remainder of said bonds; that the several enumerated percentages be of the entire amount of the bond issue; that each bond must be payable at the given time for its entire amount, and not for a percentage; that said bonds shall bear interest at the rate of not to exceed six per cent. per annum payable semi-annually on the first day of June and December of each year. The principal and interest shall be payable at the office of the county treasurer of the county in which the organization of the district was effected as aforesaid, and at such other place as the board of directors may designate in such bond. Said bonds shall be each of the denomination of one hundred dollars, nor more than five hundred dollars, shall be negotiable in form, executed in the name of the district and signed by the president and secretary, and the seal of the district shall be affixed thereto. Said bonds shall be numbered consecutively as issued, and bear date at the time of their issue. Coupons for the interest shall be attached to each bond bearing the lithographed signatures of the president and secretary. Said bonds shall express on their face that they are issued by the authority of this act, stating its title and date of approval. The secretary shall keep a record of the bonds sold, their number, date of sale, the price received, and the name of the purchaser. Provided, any such district may, by a majority vote of the legal electors of said district, provide for the issuance of bonds that will mature in any number of years less than twenty, and arrange for the payment thereof, in series as above provided; Provided, further, That when the money provided by any previous issue of bonds has become exhausted by expenditures herein authorized therefor, and it becomes necessary to raise additional money for such purposes, additional bonds may be issued submitting the question at special election to the qualified voters of said district, otherwise complying with the provisions of this section in respect to an original issue of such bonds; Provided, also, The lien for taxes, for the payment of the interest and principal of any bond issue, shall be a prior lien to that of any subsequent bond issue. [L. '05, pp. 256-8, §15.

§ 531. (16) Bonds—Sale—Proceeds.

The board may sell bonds from time to time in such quantities as may be necessary and most advantageous to raise the money for the construction or purchase of canals, reservoir sites, reservoirs, water rights and works, and otherwise to fully carry out the object and purposes of this act Before making any sale the board shall, at a meeting, by resolution declare its intention to sell a specified amount of the bonds and the day and hour and place of such sale, and shall cause such resolution to be entered in the minutes, and notice of the sale to be given by publication thereof at least twenty days in a daily newspaper published in the city of Denver, and in any other newspaper, at their discretion. The notice shall state that sealed proposals will be received by the board at their office for the purchase of the bonds, till the day and hour named in the resolution. At

the time appointed the board shall open the proposals and award the purchase of the bonds to the highest responsible bidder and may reject all bids; but said board shall, in no event, sell any of said bonds for less than ninety-five per cent. of the face value thereof. In case no bid is made and accepted as above provided the board of directors is hereby authorized to use said bonds for the purchase of canals, reservoir sites, reservoirs, water rights and works, or for the construction of any canal, reservoir and works; Provided, Such bonds shall not be so disposed of at less than ninety-five per cent. of the face value thereof. [L. '05, pp. 258-9, §16.

§ 532. (17) Bonds—Payment.

Said bonds, and the interest thereon, shall be paid by revenue derived from an annual assessment upon the real property of the district, and the real property of the district shall be and remain liable to be assessed for such payments as herein provided. [L. '05, p. 259, §17.

§ 533. (18) Board of Directors—Levy.

It shall be the duty of the board of directors, on or before September first of each year, to determine the amount of money required to meet the maintenance, operating and current expenses for the ensuing year, and to certify to the county commissioners of the county in which the office of said district is located, said amount, together with such additional amount as may be necessary to meet any deficiency in the payment of said expenses theretofore incurred. [L. '05, p. 259, §18.

§ 534. (19) Assessor—Assessment, How Made.

It shall be the duty of the county assessor of any county embracing the whole or a part of any irrigation district, to assess and enter upon his records as assessor in its appropriate column, the assessment of all real estate, exclusive of improvements, situate, lying and being within any irrigation district in whole or in part of such county. Immediately after said assessment shall have been extended as provided by law, the assessor shall make returns of the total amount of such assessment to the county commissioners of the county in which the office of said district is located. All lands within the district for the purposes of taxation under this act shall be valued by the assessor at the same rate per acre; Provided, That in no case shall any land be taxed for irrigation purposes under this act, which from any natural cause cannot be irrigated, or is incapable of cultivation. [L. '05, p. 259, §19.

§ 535. (20) County Commissioners—Rate of Levy.

It shall be the duty of the county commissioners of the county in which is located the office of any irrigation district, immediately upon receipt of the returns of the total assessment of said district, and upon the receipt of the certificate of the board of directors certifying the total amount of money required to be raised as herein provided, to fix the rate of levy necessary to provide said amount of money, and to fix the rate necessary to provide the amount of money required to pay the interest

and principal of the bonds of said district as the same shall become due; also, to fix the rate necessary to provide the amount of money required for any other purposes as in this act provided, and which are to be raised by the levy of assessments upon the real property of said district; and to certify said respective rates to the county commissioners of each county embracing any portion of said district. The rate of levy necessary to raise the required amount of money on the assessed valuation of the property of said district shall be increased fifteen per cent. to cover delinquencies. For the purposes of said district it shall be the duty of the county commissioners of each county in which any irrigation district is located in whole or in part, at the time of making levy for county purposes, to make a levy, at the rates above specified, upon all real estate in said district within their respective counties. All taxes levied under this act are special taxes. [L. '05, p. 260, §20.

§ 536. (21) District Treasurer—Duties—Responsibility.

The county treasurer of the county in which is located the office of any irrigation district, shall be and is hereby constituted ex-officio district treasurer of said district, and said county treasurer shall be liable upon his official bond, and to indictment and criminal prosecution, for malfeasance, misfeasance or failure to perform any duty herein prescribed as county treasurer or district treasurer, as is provided by law in other cases as county treasurer. Said treasurer shall receive and receipt for all moneys belonging to said district. It shall be the duty of the county treasurer of each county in which any irrigation district is located, in whole or in part, to collect and receipt for all taxes levied as herein provided, in the same manner and at the same time as is required in the receipt for and collection of taxes upon real estate for county purposes; Provided, however, That such county treasurer shall receive in payment of the general fund tax above mentioned for the year in which said taxes were levied, warrants drawn against said general fund the same as so much lawful money of the United States, if such warrant does not exceed the amount of general fund tax which the person tendering the same owes; Provided, further, That such county treasurer shall receive in payment of the district bond fund taxes above mentioned for the year in which said taxes were levied, interest coupons or bonds issued by said irrigation districts maturing within said year, the same as so much lawful money of the United States, if such interest coupons do not exceed the amount of district bonds, fund which the person tendering the same owes. The county treasurer of each county comprising a portion only of any irrigation district, excepting the county treasurer of the county in which the office of said district is located, on the first Monday of every month, shall remit to the district treasurer aforesaid, all moneys, warrants and coupons theretofore collected or received by him on account of said district. Every county treasurer shall keep a bond fund account and a general fund account. The bond fund shall consist of all moneys received on account of interest and principal of the bonds issued by said district, said accounts for interest and principal, each to be kept separate. The general fund shall consist of all other moneys received. The district treasurer aforesaid shall pay out of said bond fund, when

due, the interest and principal of the bonds of said district, at the time and at the place specified in said bonds, and shall pay out of said general fund only upon order signed by the president and countersigned by the secretary of said district, as herein provided. The district treasurer, on the fifteenth day of each month, shall report to the board of directors of said district the amount of money in his hands to the credit of the respective funds above provided. All such district taxes collected and paid to the county treasurer as aforesaid shall be received by said treasurers in their official capacity, and they shall be responsible for the safe keeping, disbursement and payment thereof the same as for other moneys collected by them as such treasurers; Provided, Said county treasurer shall not receive any commission for the collection of said district taxes or any extra compensation for acting as such district treasurer other than the regular salary as such county treasurer of his respective county. [L. '05, pp. 260-2, §21.

§ 537. (22) Assessment—Collection.

The revenue laws of this state for the assessment, levying and collection of taxes on real estate for county purposes, except as herein modified, shall be applicable for the purposes of this act, including the enforcement of penalties and forfeiture for delinquent taxes. [L. '05, p. 262, §22.

§ 538. (23) Construction—Bids—Contracts.

After adopting a plan for the construction of canals, reservoirs, and works, the board of directors shall give notice, by publication thereof, not less than twenty days in a newspaper published in each of the counties into which any such irrigation extends, provided a newspaper is published therein, and in such other newspapers as they may deem advisable, calling for bids for the construction of said work or any portion thereof; if less than the whole work is advertised, then the portion so advertised must be particularly described in such notice; said notice shall set forth that plans and specifications can be seen at the office of the board, and that the board will receive sealed proposals therefor, and that the contract will be let to the lowest responsible bidder, stating the time and the place for opening the proposals, which at said time and place shall be opened in public, and as soon as convenient thereafter the board shall let said work, either in portions, or as a whole, to the lowest responsible bidder, or they may reject any or all bids and readvertise for proposals, or may proceed to construct the work under their own superintendence. Contracts for the purchase of material shall be awarded to the lowest responsible bidder. The person or persons to whom a contract may be awarded shall enter into a bond, with good and sufficient sureties, to be approved by the board, payable to said district for its use, for not less than ten per cent. of the amount of the contract price, conditioned for the faithful performance of said contract. The work shall be done under the direction and to the satisfaction of the engineer in charge, and be approved by the board. [L. '05, p. 262, §23.

§ 539. (24) Claim—Audit—Payment—Warrants—Record.

No claim shall be paid by the district treasurer until the same shall have been allowed by the board, and only upon warrants

signed by the president, and countersigned by the secretary, which warrants shall state the date authorized by the board and for what purposes; and if the district treasurer has not sufficient money on hand to pay such warrant when it is presented for payment, he shall endorse thereon "not paid for want of funds; this warrant draws interest from date at six per cent. per annum," and endorse thereon the date when so presented, over his signature, and from the time of such presentation until paid such warrant shall draw interest at the rate of six per cent. per annum; Provided, When there is more than the sum of one hundred dollars or more in the hands of the treasurer it shall be applied upon said warrant. All claims against the district shall be verified the same as required in the case of claims filed against counties in this state, and the secretary of the district is hereby authorized and empowered to administer oaths to the parties verifying said claims, the same as the county clerk or notary public might do. The district treasurer shall keep a register in which he shall enter each warrant presented for payment, showing the date and amount of such warrant, to whom payable, the date of the presentation for payment, the date of payment, and the amount paid in redemption thereof, and all warrants shall be paid in the order of their presentation for payment to the district treasurer. All warrants shall be drawn payable to the claimant or bearer, the same as county warrants. [L. '05, pp. 262-3, §24.

§ 540. (25) Expenses Met By—Tolls—Assessments.

For the purpose of defraying the expenses of the organization of the district, and the care, operation, management, repair and improvement of all canals, ditches, reservoirs, and works, including salaries of officers and employees, the board may either fix rates of tolls and charges and collect the same of all persons using said canal and water for irrigation, or other purposes, and in addition thereto may provide, in whole or in part, for the payment of such expenditures by levy of assessments therefor, as heretofore provided, or by both tolls and assessment; Provided, That in case the money raised by the sale of bonds issued be insufficient, and in case bonds be unavailable for the completion of the plans of works adopted, it shall be the duty of the board of directors to provide for the completion of said plans by levy of an assessment therefor in the same manner in which levy of assessments is made for the other purposes provided for in this act. [L. '05, pp. 263-4, §25.

§ 541. (26) Crossing Streams, Highways, Railroads, State Lands, etc.

The board of directors shall have the power to construct the said works across any stream of water, water course, street, avenue, highway, railway, canal, ditch, or flume which the route of said canal or canals may intersect or cross; and if such railroad company and said board, or the owners and controllers of said property, thing or franchise so to be crossed, can not agree upon the amount to be paid therefor, or the points or the manner of said crossings, the same shall be ascertained and determined in all respects as is provided in respect to the taking of land for public

uses. The right of way is hereby given, dedicated, and set apart, to locate, construct and maintain said works, or reservoirs, over, through, or upon any of the lands which are now, or may be the property of the state. [L. '05, p. 264, §26.

§ 542. (27) Officers' Salaries—Not Interested in Contracts.

The board of directors shall each receive at the rate of two and one-half dollars per day while attending meetings, and their actual and necessary expenses while engaged in official business. The salary of the secretary shall not exceed eight hundred dollars per annum. No director or any officer named in this act shall, in any manner, be interested, directly or indirectly, in any contract awarded or to be awarded by the board, or in the profits to be derived therefrom; nor shall receive any bonds, gratuity, or bribe, and for any violation of this provision, such officer shall be deemed guilty of a felony, and such conviction shall work a forfeiture of his office, and he shall be punished by a fine not exceeding five hundred dollars, or by imprisonment in the penitentiary not exceeding five years nor less than one year. [L. '05, p. 264, §27.

§ 543. (28) Limit of Indebtedness.

The board of directors, or other officers of the district, shall have no power to incur any debt or liability whatever, either by issuing bonds or otherwise, in excess of the express provisions of this act, and any debt or liability incurred in excess of such express provisions shall be and remain absolutely void. [L. '05, p. 264, §28.

§ 544. (29) Water—Insufficient Supply—Distribution.

In case the volume of water in any canal, reservoir or other works in any district shall not be sufficient to supply the continual wants of the entire district and susceptible of irrigation therefrom, then it shall be the duty of the board of directors to distribute all available water upon certain or alternate days to different localities, as they may in their judgment think best for the interests of all parties concerned. [L. '05, pp. 264-5, §29.

§ 545. (30) Compensation for Property Taken.

Nothing herein contained shall be deemed to authorize any person or persons, to divert the waters of any river, creek, stream, canal, or reservoir to the detriment of any person or persons having a prior right to the waters of such river, creek, stream, canal, or reservoirs, unless previous compensation be ascertained and paid therefor, under the laws of this state authorizing the taking of private property for public use. [L. '05, p. 265, §30.

§ 546. (31) Boundaries—Change of—Effect.

The boundaries of any irrigation district now or hereafter organized under the provisions of this act, may be changed in the manner herein prescribed; but such change of the boundaries of the district shall not impair or affect its organization, or its rights in or to property, or any of its rights or privileges of what-

soever kind or nature, nor shall it affect, impair, or discharge any contract, obligation, lien, or charge for, or upon which it was or might become liable or chargeable had such change of its boundaries not been made. [L. '05, p. 265, §31.

§ 547. (32) Contiguous Territory—Annexation Petition.

The holder or holders of title, or evidence of title, representing a majority of the acreage of any body of land adjacent to or situate within the boundaries of any irrigation district, may file with the board of directors of said district a petition in writing, praying that such lands be included in such district. The petition shall describe the tracts, or body of land owned by the petitioners, but such description need not be more particular than is required when such lands are entered by the county assessor in the assessment book. Such petition shall be deemed to give the assent of the petitioners to the inclusion in said district of the lands described in the petition, and such petition must be acknowledged in the same manner that conveyances of land are required to be acknowledged. [L. '05, p. 265, §32.

§ 548. (33) Contiguous Territory—Notice—Costs Advanced.

The secretary of the board of directors shall cause notice of the filing of such petition to be given and published once each week for three successive weeks, in a newspaper published in the county where the office of said board is situate, which notice shall state the filing of such petition and the names of the petitioners, a description of the lands mentioned in said petition, and the prayer of said petitioners; giving notice to all persons interested, to appear at the office of said board at a time named in said notice, and show cause, in writing, if any they have, why the petition should not be granted. The time specified in the notice at which it shall be required to show cause shall be the regular meeting of the board next after the expiration of the time for the publication of the notice. The petitioner, or petitioners, shall advance to the secretary sufficient money to pay the estimated cost of all proceedings under such petition before the secretary shall be required to give such notice. [L. '05, p. 266, §33.

§ 549. (34) Contiguous Territory—Hearing—Objections.

The board of directors, at the time and place mentioned in said notice, or at such time or times to which the hearing of said petition may adjourn, shall proceed to hear the petition, and all objections thereto, presented in writing by any person, showing cause as aforesaid, why said petition should not be granted. The failure of any person interested to show cause, in writing, as aforesaid, shall be deemed and taken as an assent on his part to the inclusion of such lands in said district as prayed for in said petition. [L. '05, p. 266, §34.

§ 550. (35) Payment by Petitioners.

The board of directors, to whom such petition is presented, may require as a condition precedent to the granting of the same, that the petitioners shall severally pay to such district such re-

spective sums, as nearly as the same can be estimated by the board, as said petitioners or their grantors would have been required to pay to such district as assessments for the payment of its *pro rata* share of all bonds and the interest thereon, which may have previously thereto been issued by said district had such lands been included in such district at the time the same was originally formed or when said bonds were so issued. [L. '05, p. 266, §35.

§ 551. (36) Contiguous Territory—Boundaries—Orders—Protest.

The board of directors if they deem it not for the best interests of the district to include therein the lands mentioned in the petition, shall by order reject the said petition, but if they deem it for the best interests of the district that said lands be included the board may order that the district be so changed as to include therein the lands mentioned in the said petition. The order shall describe the entire boundaries of the district with the lands so included, if the district boundaries be changed thereby, and for that purpose the board may cause a survey to be made of such portion of such boundaries as may be deemed necessary; Provided, If within thirty days from the making of such order a majority of the qualified electors of the district protest in writing to said board against the inclusion of such lands in said district, said order shall be held for naught and such lands shall not be included therein. [L. '05, pp. 266-7, §36.

§ 552. (37) Order—Record—Effect.

Upon the allowance of such petition and in case no protest has been filed with the board within thirty days after the entry of said order as aforesaid, a certified copy of the order of the board of directors making such change, and a plat of such district, showing such change, if any, certified by the president and secretary, shall be filed for record in the office of the clerk and recorder of each county in which are situate any of the lands of the district, and the district shall remain an irrigation district, as fully to every intent and purpose as if the lands which are included in the district by the change of the boundaries as aforesaid, had been included therein at the organization of the district; and said district as so changed and all the lands therein shall be liable for all existing obligations and indebtedness of the organized district. [L. '05, p. 267, §37.

§ 553. (38) Records—Evidence.

Upon the filing of the copies of the order and the plat, as in the last preceding section mentioned, the secretary shall record in the minutes of the board the petition aforesaid; and the said minutes, or a certified copy thereof, shall be admissable [admissible] in evidence with the same effect as the petition. [L. '05, p. 267, §38.

§ 554. (39) Legal Representatives Petitioners.

A guardian, executor or an administrator of an estate, who is appointed as such under the laws of this state, and who, as such guardian, executor or administrator, is entitled to the possession

of the lands belonging to the estate which he represents, may on behalf of his ward or the estate which he represents, upon being thereunto authorized by the proper court, sign and acknowledge the petition in this act mentioned, and may show cause, as in this act mentioned, why the boundaries of the district should not be changed. [L. '05, pp. 267-8, §39.

§ 555. (40) Redivision of District—Election of Officers—Precincts.

In case of the inclusion of any land within any district by proceedings under this act the board of directors shall, at least thirty days prior to the next succeeding general election, make an order redividing such district into three divisions, as nearly equal in size as may be practicable, which shall be numbered first, second and third, and one director shall thereafter be elected by each division. For the purposes of election the board of directors shall establish a convenient number of election precincts in said districts, and define the boundaries thereof, which said precincts may be changed from time to time as the board may deem necessary. [L. '05, p. 268, §40.

§ 556. (41) Exclusion of Lands.

Any tract of land included within the boundaries of any such district, at or after its organization, under the provisions of this act, may be excluded therefrom, in the manner herein prescribed, but such exclusion of land from the district shall not impair or affect its organization, or its rights in or to property, or any of its rights or privileges of whatever kind or nature; nor shall such exclusion affect, impair or discharge any contract, obligation, lien or charge for or upon which it would or might become liable or chargeable, had such land not been excluded from the district. [L. '05, p. 268, §41.

§ 557. (42) Petition for Exclusion.

The owner or owners in fee of any lands constituting a portion of any irrigation district may file with the board of directors of the district, a petition praying that such lands may be excluded and taken from said district. The petition shall describe the lands which the petitioners desire to have excluded, but the description of such lands need not be more particular than required when lands are entered in the assessment book by the county assessor. Such petition must be acknowledged in the same manner and form as is required in case of a conveyance of land. [L. '05, p. 268, §42.

§ 558. (43) Petition for Exclusion—Costs—Notice.

The secretary of the board of directors shall cause a notice of the filing of such petition to be published for at least three weeks in some newspaper published in the county where the office of the board of directors is situated, and if any portion of said district lie within another county or counties, then said notice shall be so published in a newspaper published within each of said counties; or if no newspapers be published therein, then by posting such notice for the same time in at least three public places in said district, and in case of the posting of said notices,

one of said notices must be so posted on the lands proposed to be excluded. The notice shall state the filing of such petition, the names of the petitioners, description of the lands mentioned in said petition, and the prayer of said petitioners; and it shall notify all persons interested to appear at the office of said board at a time named in said notice, and show cause in writing, if any they have, why said petition should not be granted. The time to be specified in the notice at which they shall be required to show cause shall be the regular meeting of the board next after the expiration of the time for the publication of the notice. The petitioner or petitioners shall advance to the secretary sufficient money to pay the estimated cost of all proceedings under such petition before the secretary shall give such notice. [L. '05, p. 269, §43.

§ 559. (44) Petition for Exclusion—Hearing.

The board of directors at the time and place mentioned in the notice, or at the time or times to which the hearing of said petition may be adjourned, shall proceed to hear the petition and all objections thereto, presented in writing by any persons, showing cause as aforesaid why the prayer of said petition should not be granted. The filing of such petition with such board, as aforesaid, shall be deemed and taken as an assent by each and all of such petitioners to the exclusion from such district of the lands mentioned in the petition, or any part thereof. [L. '05, p. 269, §44.

§ 560. (45) Petition for Exclusion—Protest—Orders.

The board of directors, if they deem it not for the best interest of the district that the lands mentioned, in the petition or some portion thereof, should be excluded from said district, shall order that said petition be denied; but if they deem it for the best interest of the district that the lands mentioned in the petition, or some portion thereof, be excluded from the district, and if there are no outstanding bonds of the district, then the board may order the lands mentioned in the petition, or some defined portion thereof, to be excluded from the district. Provided, if within thirty days from the making of such order a majority of the qualified electors of the district protest in writing to said board against the exclusion of such lands from said district, said order shall be held for naught and such lands shall not be excluded therefrom. [L. '05, pp. 269-70, §45.

§ 561. (46) Order—Record—Effect.

Upon the allowance of such petition and in case no protest has been filed with the board within thirty days after the entry of said order as aforesaid, a certified copy of the order of the board of directors making such change and a plat of such district showing such change, certified by the president and secretary, shall be filed for record in the office of the clerk and recorder of each county in which are situate any of the lands of the district, and the district shall remain an irrigation district as fully to every intent and purpose as if the lands which are excluded by the change of the boundaries as aforesaid, had not been excluded therefrom. [L. '05, p. 270, §46.

§ 562. (47) Division of Districts—Directors—Precincts.

At least thirty days before the next general election of such district the board of directors thereof may make an order dividing said district into three divisions, as nearly equal in size as practicable, which shall be numbered first, second and third, and one director shall be elected for each division by the qualified electors of the whole district. For the purpose of election in such district the said board of directors must establish a convenient number of election precincts, and define the boundaries thereof, which said precincts may be changed from time to time, as the board of directors may deem necessary. [L. '05, p. 270, §47.

§ 563. (48) Dissolution of District—Petition for—Election.

Whenever a majority of the resident freeholders, representing a majority of the number of acres of the irrigable land, in any irrigation district organized, or hereafter to be organized, under this act, shall petition the board of directors to call a special election, for the purpose of submitting to the qualified electors of said irrigation district a proposition to vote on the dissolution of said irrigation district, setting forth in said petition, that all bills and claims of every nature whatsoever have been fully satisfied and paid, it shall be the duty of said directors, if they shall be satisfied that all claims and bills have been fully satisfied, to call an election, setting forth the object of the said election, and to cause notice of said election to be published in some newspaper in each of the counties or county in which said district is located, for a period of thirty (30) days prior to said election, setting forth the time and place for holding said election in each of the three voting precincts in said district. It shall also be the duty of the directors to prepare ballots to be used at said election on which shall be written or printed the words: "For Dissolution —Yes," and "For Dissolution—No." [L. '05, pp. 270-1, §48.

§ 564. (49) Dissolution of District—Canvass—Record.

The board of directors shall name a day for canvassing the vote, and if it shall appear that a majority of said ballots contain the words, "For Dissolution—Yes," then it shall be the duty of said board of directors to declare said district to be disorganized, and shall certify to the county clerk of the respective counties, in which the district is situated, stating the number of signers to said petition. That said election was called and set for the ..... day of ..... month of ..... year. That said election was held and that so many votes (stating the number) had been cast for, and that so many votes (stating the number) had been cast against said proposition, said certificate to bear the seal of the district, and the signatures of the president and secretary of said board of directors. And it shall be the duty of the said respective clerks to record all such certificates in the records of the respective counties. Should it appear that a majority of the votes cast at said election were "For Dissolution—No," then the board of directors shall declare the proposition lost and shall cause the result and the vote to be made a part of the records of said irrigation district. [L. '05, p. 271, §49.

§ 565. (50) Judicial Examination—Validity of Bonds.

The board of directors of an irrigation district organized under the provisions of this Act may commence special proceedings, in and by which the proceedings of said board and of said district providing for and authorizing the issue and sale of the bonds of said district, whether said bonds or any of them have or have not been sold, or disposed of, may be judicially examined, approved and confirmed. [L. '05, pp. 271-2, §50.

§ 566. (51) Judicial Examination—Petition.

The board of directors of the irrigation district shall file in the district court of the county in which the lands of the district, or some portion thereof, are situated, a petition, praying, in effect, that the proceedings aforesaid may be examined, approved and confirmed by the court. The petition shall state the facts showing the proceedings had for the issue and sale of said bonds, and shall state generally that the irrigation district was duly organized and that the first board of directors was duly elected, but the petition need not state the facts showing such organization of the district, or the election of said first board of directors. [L. '05, p. 272, §51.

§ 567. (52) Judicial Examination—Notice of Hearing.

The court shall fix the time for the hearing of said petition and shall order the clerk of the court to give and publish a notice of the filing of said petition. The notice shall be given and published for three successive weeks in a newspaper published in the county where the office of the district is situated. The notice shall state the time and place fixed for the hearing of the petition and the prayer of the petitioners, and that any person interested in the organization of said district, or in the proceedings for the issue or sale of said bonds, may, on or before the day fixed for the hearing of said petition, demur to or answer said petition. The petition may be referred to and described in said notice as the petition of the board of directors of_____irrigation district, (giving its name) praying that the proceedings for the issue and sale of said bonds of said district may be examined, approved and confirmed by the court. [L. '05, p. 272, §52.

§ 568. (53) Judicial Examination—Answer—Pleading.

Any person interested in said district, or in the issue or sale of said bonds, may demur to or answer said petition. The provisions of the Code of Civil Procedure respecting the demurrer and answer to a verified complaint shall be applicable to a demurrer and answer to said petition. The person so demurring and answering said petition shall be the defendant to the special proceeding, and the board of directors shall be the plaintiff. Every material statement of the petition not specifically controverted by the answer shall, for the purpose of said special proceeding, be taken as true, and each person failing to answer the petition shall be deemed to admit as true all the material statement of the petition. The rules of pleading and practice relating to appeals and writs of error provided by the Code of Civil Pro-

cedure which are not inconsistent with the provisions of this act are applicable to the special proceedings herein provided for. [L. '05, pp. 272-3, §53.

§ 569. (54) Judicial Examination—Determination—Costs.

Upon the hearing of such special proceeding the court shall find and determine whether the notice of the filing of the petition has been duly given and published for the time and in the manner in this act prescribed, and shall have power and jurisdiction to examine and determine the legality and validity of, and approve and confirm, each and all of the proceedings for the organization of said district under the provisions of said act, from and including the petition for the organization of the district, and all other proceedings which may affect the legality or validity of said bonds, and the order of the sale and the sale thereof. The court, in inquiring into the regularity, legality or correctness of said proceedings, must disregard any error, irregularity or omission which does not affect the substantial rights of the parties to said special proceedings; and the court may by decree approve and confirm such proceedings in part, and disapprove and declare illegal or invalid other or subsequent parts of the proceedings. The costs of the special proceedings may be allowed and apportioned between the parties, in the discretion of the court. [L. '05, p. 273, §54.

§ 570. (55) Repeal.

That an act entitled, An Act to provide for the organization and government of irrigation districts, etc., approved April 12th, 1901, and all acts and parts of acts amendatory thereof, be and the same are hereby repealed. Provided, Nothing herein contained shall invalidate or affect any act or proceeding done or pending thereunder; but all such pending proceedings may be continued and concluded under such repealed provisions, the same as if this statute had not been adopted, or may be continued or concluded under the provisions of this act; And, Provided further, That nothing herein contained shall impair the organization rights, powers and privileges of any irrigation district organized under any act or provision so repealed. [L. '05, p. 273-4, §55.

§ 571. (56) Emergency.

In the opinion of the general assembly an emergency exists; therefore this act shall be in force and take effect from and after its passage. [L. '05, p. 274, §56.

DIVISION IV.—UNINCORPORATED WATER DISTRICTS.

§ 572. (2310) Lands Watered Constitute Districts.

That the lands now irrigated, or which may be hereafter irrigated from ditches now taking water from the following described rivers or natural streams of the state of Colorado, are hereby declared to constitute irrigation districts. [L. '79, p. 97, §5; G. S. '83, p. 568, §1741.

§ 573. (2311) District No. 1.

That water district No. 1 shall consist of all lands in the state of Colorado irrigated by water taken from that portion of the South Platte river between the mouth of the Cache la Poudre river and the west boundary line of Washington county, and from the streams draining into the said portion of the South Platte river. [L. '79, p. 97, §5; G. S. '83, p. 568, §1742; amended, L. '87, p. 303, §1; amended, L. '89, p. 212, §13.

§ 574. (2312) District No. 2.

That district No. 2 shall consist of land irrigated from ditches taking water from the South Platte river and its tributaries, except Big Thompson, St. Vrain and Clear Creek, between the mouth of the Cache la Poudre and the mouth of Cherry Creek. [L. '79, p. 97, §7; G. S. '83, p. 568, §1743.

§ 575. (2313) District No. 3.

That district No. 3 shall consist of all lands irrigated from ditches taking water from the Cache la Poudre and its tributaries. [L. '79, p. 98, §8; G. S. '83, p. 568, §1744.

§ 576. (2314) District No. 4.

That district No. 4 shall consist of all lands irrigated from ditches taking water from the Big Thompson and its tributaries. [L. '79, p. 98, §9; G. S. '83, p. 568, §1745.

§ 577. (2315) District No. 5.

That district No. 5 shall consist of all lands irrigated from ditches taking water from the St. Vrain creek and its tributaries, except the Boulder, its tributaries, and Coal creek. [L. '79, p. 98, §10; G. S. '83, p. 569, §1746.

§ 578. (2316) District No. 6.

That district No. 6 shall consist of all lands irrigated from ditches taking water from the Boulder and its tributaries, and Coal creek. [L. '79, p. 98, §11; G. S. '83, p. 569, §1747.

§ 579. (2317) District No. 7.

That district No. 7 shall consist of all lands irrigated from ditches taking water from Clear creek and its tributaries. [L. '79, p. 98, §12; G. S. '83, p. 569, §1748.

§ 580. (2318) District No. 8—Boundaries.

That water district No. 8 shall consist of all lands irrigated by ditches taking water from Cherry creek, Plum creek and Platte river, and their tributaries, except Bear creek, above water district No 2, and below the forks of the north and south branches of the South Platte river, and including all lands and ditches in Douglas county. [L. '99, p. 430, §1; amending original §2318.

§ 581. (2319) District No. 9.

That district No. 9 shall consist of all lands irrigated by ditches taking water from Bear creek and its tributaries. [L. '79, p. 98, §14; G. S. '83. p. 569, §1750.

§ 582. (2320) District No. 10—New Districts to be Formed by Governor.

That district No. 10 shall consist of all lands irrigated from ditches taking water from the Fountain and its tributaries; Provided, That said district shall not extend beyond the limits of El Paso county.

Other irrigation districts may be formed from time to time by the governor, on petition of parties interested. [L. '79, p. 98, §15; G. S. '83, p. 569, §1751.

§ 583. (2321) Introductory Clause.

That the lands now, or which may be hereafter, irrigated from ditches, or canals, taking water from any of the following described rivers, or natural streams, in the state of Colorado, are hereby declared to constitute irrigation districts. [L. '85, p. 256, §3.

§ 584. (2322) District No. 11.

Water district No. 11 shall consist of all lands irrigated by water taken from that portion of the Arkansas river above water district No. 12, and from the streams draining into the said portion of the Arkansas river. [L. '85, pp. 256, 257, §4; amended, L. '89, p. 370, §1.

§ 585. (2323) District No. 12—Boundaries.

That district No. 12 shall consist of all lands irrigated from ditches or canals taking water from that part of the Arkansas river lying in Fremont county; also, lands irrigated from ditches or canals taking water from the tributaries of said portion of the Arkansas river, except Texas creek and its tributaries, and that part of Grape creek which lies above the south line of said Fremont county. [L. '95, p. 198, §1.

§ 586. (2324) District No. 13—Boundaries.

That district No. 13 shall consist of all lands irrigated from ditches or canals taking water from Texas creek and its tributaries and that part of Grape creek and its tributaries lying in Custer county. [L. '95, pp. 198-199, §2.

§ 587. (2325) District No. 14.

"Water district No. 14 shall consist of all lands irrigated by water taken from that portion of the Arkansas river situated within the boundaries of Pueblo county and from the streams draining into the said portion of the Arkansas river, except the St. Charles and Huerfano rivers and their tributaries, and except also that portion of the Fountain embraced in water district No. 10, and the streams draining into the said portion of the Fountain." [L. '85, p. 257, §7; amended, L. '89, p. 370, §2.

§ 588. (2326) District No. 15.

That district No. 15 shall consist of all lands irrigated from ditches, or canals, taking water from the St. Charles and its tributaries. [L. '85, p. 257, §8.

§ 589. (2327) District No. 16.

That district No. 16 shall consist of all lands irrigated from ditches and canals taking water from the Huerfano and its tributaries. [L. '85, p. 257, §9.

§ 590, (2328) District No. 17.

"Water district No. 17 shall consist of all lands irrigated by water taken from that portion of the Arkansas river below water district No. 14 and above the mouth of the Purgatoire river, and from the streams draining into the said portion of the Arkansas river, except the Apishapa river and its tributaries." [L. '85, p. 257, §10; amended, L. '89, p. 370. §3.

§ 591. (2329) District No. 18.

That district No. 18 shall consist of all lands irrigated from ditches and canals taking water from the Apishapa and its tributaries. [L. '85, p. 257, §11.

§ 592. (2330) District No. 19.

That district No. 19 shall consist of all lands irrigated from ditches, or canals, taking water from the Purgatoire and its tributaries. [L. '85, p. 257, §12.

§ 593. (2331) District No. 20.

Water district No. 20 shall consist of all lands irrigated by water taken from that portion of the Rio Grande above the mouth of the Rio Conejos, and from the streams draining into the said portion of the Rio Grande, including Piedra, Spring, Gato and San Francisco creeks, and all other streams that would in time of flood flow into the said portion of the Rio Grande, although at ordinary stages the waters thereof might not flow upon the surface to the Rio Grande, except Alamosa river and its tributaries and the La Jara and Trinchera creeks and their tributaries; Provided, That nothing in this Act shall be construed as inconsistent with the provisions of the acts creating water districts numbered 25, 26 and 27. [L. '85, p. 258, §§13, 16; amended, L. '87, p. 301, §42; amended, L. '89. p. 218, §1.

§ 594. (2332) District No. 21.

That district No. 21 shall consist of all lands irrigated from ditches or canals taking water from the Alamosa and La Jara creeks and their tributaries. [L. '85, p. 258, §14.

§ 595. (2333) District No. 22.

That district No. 22 shall consist of all lands in the state of Colorado irrigated from ditches or canals taking water from Conejos creek and its tributaries. [L. '85, p. 258, §15.

§ 596. (2334) District No. 23—Boundaries.

Water district No. 23 shall consist of all lands in the state of Colorado being, or to be, irrigated from ditches or canals taking water from the South Platte river, and from any of its direct, or indirect, tributaries, at any point or points above water district No. 8, in the said state, and all lands upon the tributaries of the Arkansas river which lie within the boundaries of Park county. [L. '99, p. 431, §1, amending original §2334.

§ 597. (2335) District No. 24.

"Water district No. 24 shall consist of all lands in the state of Colorado irrigated by water taken from that portion of the Rio Grande between the mouth of the Rio Conejos and the Colorado state line, from the streams draining into the said portion of the Rio Grande and from Costilla creek, and the streams draining into Costilla creek." [L. '85, p. 258, §17; amended, L. '89, p. 370, §4.

§ 598. (2336) District No. 25—Boundaries.

That water district No. 25 shall consist of all lands irrigated by water taken from the San Luis creek and all its tributaries. [L. '99, p. 237, §1, amending original §2336.

§ 599. (2337) District No. 26.

That district No. 26 shall consist of all lands irrigated from ditches or canals, taking water from Saguache creek and its tributaries. [L. '85, p. 258, §19.

§ 600. (2338) District No. 27.

That district No. 27 shall consist of all the lands irrigated from ditches or canals, taking water from Tuttle, Carnero, La Garita and all other creeks and their tributaries, which have their sources of water supply in the La Garita mountains and flow eastward into the San Luis valley. [L. '85, p. 258, §20.

§ 601. (2339) District No. 28.

That district No. 28 shall consist of all lands irrigated from ditches or canals, taking water from the Tomichi and its tributaries. [L. '85, p. 259, §21.

§ 602. (2340) District No. 29.

That district No. 29 shall consist of all the lands lying in the state of Colorado irrigated from ditches or canals, taking water from that part of the San Juan river, and its tributaries, which lie above the junction of the San Juan river and the Rio Piedra, and including the Rio Piedra. [L. '85, p. 259, §22.

§ 603. (2341) District No. 30.

That district No. 30 shall consist of all lands lying in the state of Colorado irrigated from ditches or canals, taking water from that part of the Rio Las Animas river and its tributaries, which lie in Colorado. [L. '85, p. 259, §23.

§ 604. (2342) District No. 31.

That district No. 31 shall consist of all lands in the state of Colorado irrigated from ditches or canals, taking water from that part of the Los Pinos river, and its tributaries, which lie in Colorado. [L. '85, p. 259, §24.

§ 605. (2343) District No. 32.

"Water district No. 32 shall consist of all lands in the state of Colorado irrigated by water taken from those natural streams which drain into the San Juan river, and are not included in water districts numbers 29, 30, 31, 33 and 34." [L. '85, p. 259, §25; amended, L. '89, p. 371, §6.

§ 606. (2344) District No. 33.

That district No. 33 shall consist of all lands lying in the state of Colorado irrigated from ditches or canals, taking water from the La Plata river, and its tributaries, which lie in Colorado. [L. '85. p. 259, §26.

§ 607. (2345) District No. 34—Boundaries.

That water district No. 34 shall consist of all lands lying in the state of Colorado, irrigated from ditches or canals taking water from the Rio Mancos, and its tributaries; and also all lands irrigated from ditches or canals taking water from that part of the Dolores river within the boundaries of said Montezuma county, and from streams draining into said portion of Dolores river. [L. '97, p. 175, §1, amending original §2345.

§ 608. (2346) District No. 35—Boundaries.

That water district No. 35 shall consist of all lands lying in the county of Costilla, in this state, watered by the Trinchera creek, Sand or Medano creek, Big Spring creek, Little Spring creek, Mosca creek, North and South Zapato creeks, Sierra Blanca creek, and all streams draining into the said creeks, andall other streams between said Trinchera creek and said Sand or Medano creek. [L. '99, p. 237, §2, amending original §2346.

§ 609. (2347) Introductory Clause.

That the lands now, or which may be hereafter, irrigated from ditches or canals taking water from any of the following described rivers, or natural streams, in the state of Colorado, are hereby declared to constitute irrigation districts. [L. '87, p. 313, §2.

§ 610. (2348) District No. 36.

That district No. 36 shall consist of all the lands irrigated from water taken from the Blue river and its tributaries. [L. '87, p. 313, §3.

§ 611. (2349) District No. 37.

That district No. 37 shall consist of all lands lying in the state of Colorado, irrigated by waters taken from the Eagle river and its tributaries. [L. '87, p. 313, §4.

§ 612. (2350) District No. 38.

That district No. 38 shall consist of all the lands lying in the state of Colorado, irrigated by waters taken from the Roaring Fork river and its tributaries. [L. '87, p. 313, §5.

An Act concerning water districts Nos. 39, 42 and 70, in the state of Colorado.—*Approved April* 10, '05. *In force April* 10, '05. L. '05, p. 243.

Be it Enacted by the General Assembly of the State of Colorado:

§ 613. (1)

The boundaries of water district No. 39 are hereby defined to include all the tributaries of Grand river on the north side thereof, from the mouth of the Roaring Fork river, westerly to

the state line; and shall consist of all lands lying in the state of Colorado, irrigated by any and all such tributaries, excepting Roan creek, and its tributaries, and all lands irrigated thereby; and excepting also all lands lying in Mesa county. The said water district No. 39 shall include only all the lands in Garfield county, above described, and which are not irrigated from Roan creek or any of its tributaries. [L. '05, p. 243, §1. See §§616, 644-8 *infra*.

§ 614. (2352) District No. 40—Boundaries.

That water district forty shall consist of all lands irrigated from ditches taking water from Crystal creek and Smith's Fork, Escalante creek, and their tributaries, all lands lying within the boundaries of Delta county irrigated from the Gunnison river and its tributaries, (except lands irrigated from the Uncompahgre river and its tributaries), and all lands in the county of Delta and the county of Gunnison irrigated by ditches taking their water from the north fork of the Gunnison river and its tributaries. [L. '03, p. 296, §1, amending L. '87, p. 311, §2, same 1 Mills', §2352.

§ 615. (2353) District No. 41.

That district No. 41 shall consist of all lands irrigated from ditches or canals taking water from the Uncompahgre river and its tributaries, except so much as are within the boundary lines of Ouray county. [L. '87, p. 311, §3.

§ 616. (2354) District No. 42 as Amended.

The boundaries of water district No. 42 shall not be construed to include any land hereinabove embraced in either of said water districts, 39 or 70. [L. '05, p. 243, §3. See §613 *supra*, also §§645-8 *infra*.

§ 617. (2355) District No. 43.

That water district No. forty-three is hereby established, and shall consist of all lands irrigated by ditches taking water from the White river and its tributaries. [L. '87, p. 307, §1.

§ 618. (2356) District No. 44.

That water district No. 44 shall consist of all lands irrigated by water taken from that portion of the Yampa river above the mouth of the Little Snake river and below the mouth of Fortification creek, and from the streams draining into the said portion of the Yampa river. [L. '89, p. 211, §2.

§ 619. (2357) District No. 45.

That water district No. 45 shall consist of all lands situated on the south side of the Grand river and irrigated from ditches or canals taking water from the Grand river and its tributaries, between the mouth of Roaring Fork river and the north line of Mesa county. [L. '89, p. 213, §17.

§ 620. (2358) District No. 46.

That water district No. 46 shall consist of all lands irrigated by water taken from that portion of the North Platte river above the mouth of Michigan creek, and from the streams draining into the said portion of the North Platte river. [L. '89, p. 212, §10.

§ 621. (2359) District No. 47.

That water district No. 47 shall consist of all lands in the state of Colorado irrigated by water taken from that portion of the North Platte river between water district No. 46 and the state line of Colorado, and from the streams draining into the said portion of the North Platte river, and from Granite and Encampment creeks and the streams draining into the said creeks. [L. '89, p. 212, §11.

§ 622. (2360) District No. 48.

That water district No. 48 shall consist of all lands in the state of Colorado irrigated by water taken from the Big Laramie river and from the streams draining into the said river. [L. '89, p. 212, §12.

§ 623. (2361) District No. 49.

That water district No. 49 shall consist of all lands in the state of Colorado irrigated by water taken from the south fork of the Republican river and the Smoky Hill river, and the streams draining into the said rivers. [L. '89, p. 471, §1.

§ 624. (2362) District No. 50.

That water district No. 50 shall consist of all lands irrigated by water taken from the Muddy and Troublesome creeks, and from the streams draining into the said creeks. [L. '89, p. 213, §18.

§ 625. (2363) District No. 51.

That water district No. 51 shall consist of all lands irrigated by water taken from the Grand river above the mouth of the Blue river, and from the streams draining into the said portion of the Grand river, except the Muddy and Troublesome creeks and the streams draining into the said creeks. [L. '89, p. 213, §19.

§ 626. (2364) District No. 52.

That water district No. 52 shall consist of all lands on the south side of the Grand river irrigated by water taken from the Grand river below the mouth of Blue river and above the mouth of Roaring Fork river, and from the streams draining into the said portion of the Grand river, except Eagle river and its tributaries. [L. '89, p. 213, §20.

§ 627. (2365) District No. 53.

That water district No. 53 shall consist of all lands on the north side of Grand river irrigated by water from that portion of the Grand river below the mouth of Muddy creek and above the mouth of Roaring Fork river, and from the streams draining into the said portion of the Grand river. [L.' 89, p. 214, §21.

§ 628. (2366) District No. 54.

That water district No. 54 shall consist of all lands in the state of Colorado irrigated by water taken from that portion of the Little Snake river and its tributaries above the most westerly intersection of said river with the Colorado state line. [L. '89, p. 211, §3.

§ 629. (2367) District No. 55.

That water district No. 55 shall consist of all lands in the state of Colorado irrigated by water taken from that portion of the Yampa river below water district No. 44, and from the streams draining into the said portion of Yampa river not included in water district No. 54. [L. '89, p. 211, §4.

§ 630. (2368) District No. 56.

That water district No. 56 shall consist of all lands in the state of Colorado irrigated by water taken from that portion of the Green river embraced within the boundaries of the county of Routt, and from the streams draining into the said portion of the Green river, except the Yampa river and its tributaries. [L. '89, p. 211, §5

§ 631. (2369) District No. 57.

That water district No. 57 shall consist of all lands irrigated by water taken from that portion of the Yampa river above water district No. 44 and below the mouth of Elk creek, and from the streams draining into the said portion of the Yampa river. [L. '89, p. 211, §6.

§ 632. (2370) District No. 58.

That water district No. 58 shall consist of all lands irrigated by water taken from the Yampa river above water district No. 57, and from the streams draining into the said portion of Yampa river. [L. '89, p. 211, §7.

§ 633. (2371) District No. 59

That water district No. 59 shall consist of all lands irrigated by water taken from the Gunnison river above the mouth of Tomichi creek, and from all streams draining into the said portion of Gunnison river; also of all lands on the north side of Gunnison river irrigated by water taken from the Gunnison river below the mouth of Tomichi creek and above water district No. 40, and from the streams draining into the said portion of the Gunnison river. [L. '89, p. 214, §22.

§ 634. (2372) District No. 60.

That water district No. 60 shall consist of all lands irrigated by water taken from the San Miguel river and from the streams draining into the said river. [L. '89, p. 214, §23.

§ 635. (2373) District No. 61—Boundaries.

That water district No. 61 shall consist of all lands in the state of Colorado irrigated from that portion of Dolores river between the mouth of San Miguel river and the county line of Dolores county, and from streams draining into the said portion of Dolores river. [L. '97, p. 175, §2, amending original §2373.

§ 636. (2374) District No. 62.

That water district No. 62 shall consist of all lands south of the Gunnison river irrigated by water taken from the Gunnison river, below the mouth of Tomichi creek and above water district No. 40, and from the streams draining into the said portion of the Gunnison river. [L. '89, p. 214, §25.

§ 637. (2375) District No. 63.

That water district No. 63 shall consist of all lands in the state of Colorado irrigated by water taken from that portion of the Dolores river below the mouth of the San Miguel river and from the streams draining into the said portion of the Dolores river. [L. '89, p. 214, §26.

§ 638. (2376) District No. 64.

That water district No. 64 shall consist of all lands irrigated by water taken from that portion of the South Platte river between the westenr boundary line of Washington county and the state line of Colorado and Nebraska, and from the streams draining into the said portion of the South Platte river. [L. '89, p. 213, §14.

§ 639. (2377) District No. 65.

That water district No. 65 shall consist of all lands in the state of Colorado irrigated by water taken from the middle and north forks of the Republican river, from Sandy and Frenchman's creeks, and the tributaries of these streams. [L. '89, p. 213, §15.

§ 640. (2378) District No. 66.

That water district No. 66 shall consist of all lands in the state of Colorado irrigated by water taken from the Dry Cimarron and the streams draining into the said river. [L. '89, p. 472, §2.

§ 641. (2379) District No. 67.

That water district No. 67 shall consist of all lands in the state of Colorado irrigated by water taken from that portion of the Arkansas river below the mouth of the Purgatoire river, and from the streams draining into the said portion of the Arkansas river. [L. '89, p. 472, §3.

§ 642. (2380) District No. 68.

(That) water district No. 68 shall consist of all lands irrigated by water taken from that portion of the Uncompahgre river above water district No. 41, and from the streams draining into the said portion of the Uncompahgre river. [L. '89, p. 213, §16.

§ 643. (2380a) District No. 69—Boundaries.

That water district No. 69 shall consist of all lands lying in the state of Colorado irrigated from ditches or canals taking water from those portions of the Dolores river within Dolores county, and froms [from] streams draining into said portions of the Dolores river. [L. '97, p. 175, §3.

§ 644. (2) District No. 70.

That water district No. 70 shall consist of all lands irrigated by water taken from Roan creek and all its tributaries situated within the counties of Garfield and Mesa, in this state, and also all lands in Mesa county situate north of Grand river and east of Roan creek. [L. '05, p. 243, §2. See §§613, 616 *supra*; also §§645-648 *infra*.

§ 645. (4) Districts Nos. 39, 42, 70—Water Division No. 5.

Said water districts Nos. 39 and 70 shall be and remain in irrigation division No. 5, and said water district No. 42 shall be and remain in irrigation division No. 4. [L. '05, p. 243, §4.

§ 646. (5) Jurisdiction of Courts Over Districts.

The district court of Garfield county shall retain and have jurisdiction over the adjudication of water rights and priorities in said water districts Nos. 39 and 70, and the district court of Mesa county shall retain and have jurisdiction of water rights and priorities in said water district No. 42. [L. '05, p. 244, §5.

§ 647. (6) Expenses of Commissioner.

All charges of the water commissioner and his deputies, that may be appointed for said water district No. 70, shall be borne equally between the counties of Garfield and Mesa. [L. '05, p. 244, §6.

§ 648. Repeal.

All acts and parts of acts in conflict herewith are to that extent hereby repealed. [L. '05, p. 244, §7.

DIVISION V.—WATER COMMISSIONERS.

§ 649. (2381) Number of Water Commissioners—How Appointed—Bonds—Term of Office.

There shall be one water commissioner for each of the above-named districts, and for each district hereafter formed, who shall be appointed by the governor, to be selected by him from persons recommended to him by the several boards of county commissioners of the counties into which water districts may extend; and the water commissioner so appointed, shall, before entering upon his duties, give a good and sufficient bond for the faithful discharge of his duties, with not less than three sureties, in a sum not less than one thousand nor more than five thousand dollars, the amount of said bond to be fixed by the county commissioners, and approved by the governor and state engineer. The commissioner so appointed shall hold his office until his successor is appointed and qualified; Provided, however, That if such water district shall be embraced in more than one county, and the several counties in which such water district is situated, disagree as to the amount of the bond as herein required of water commissioners, then and in that event, the governor shall fix the amount thereof, with the same effect as though fixed by the county commissioners. [L. '79, pp. 98, 99, §16; G. S. '83, p. 569, §1752; amended, L. '87, p. 302, §1.

§ 650. (2382) Vacancies—How Filled—Removal.

The governor shall, by like selection and appointment, fill all vacancies which may be occasioned by death, resignation or continued absence from the district, removal or otherwise. Said county commissioners may, from time to time, recommend persons to be appointed as above provided, and the governor may, at any time, remove any water commissioner in his discretion. [L. '87, p. 302, §2.

§ 651. (2383) Oath of Office Within Ten Days.

That within ten days after his appointment, and before entering upon the duties of his office, such water commissioner shall take and subscribe the oath of office prescribed by the constitution of this state. [L. '79, p. 99, §17; G. S. '83, p. 570, §1753.

§ 652. (2384) Duty of Water Commissioners — Open and Shut Head-gates.

It shall be the duty of said water commissioners to divide the water in the natural stream or streams of their district among the several ditches taking water from the same, according to the prior rights of each respectively; in whole or in part to shut and fasten, or cause to be shut and fastened, by order given to any sworn assistant, sheriff or constable of the county in which the head of such ditch is situated, the head-gates of any ditch or ditches heading in any of the natural streams of the district, which in a time of a scarcity of water, shall not be entitled to water by reason of the priority of the rights of others below them on the same stream. [L. '79, p. 99, §18; G. S. '83, p. 570, §1754.

An Act to provide for the regulation of the use of the waters of this state.—*Approved April* 13, 1895. *In force April* 13, 1895. L. '95, p. 197.

§ 653. (2384*a*) Commissioners Examine Ditches — Waste — Shut Off Supply.

The water commissioners of the several water districts of this state are hereby empowered, and it is hereby made their duty, upon the application of the owners of one or more ditches in their district, to immediately make, or cause to be made, a thorough examination of all ditches within their district for the purpose of ascertaining what use is being made by the owners of or consumers of water from said ditches; and if at any time he shall ascertain that the owner or owners of any ditch drawing water from the natural streams furnishing water to his district shall be permitting any of the waters flowing in such ditch to go to waste, or to be wastefully, or extravagantly or wrongfully, used by its waters consumers, or put to any other use than that to which it is entitled to be used in the order of priority, at such times as the same is being needed by other appropriators, it shall be the duty of such water commissioner to immediately shut off the supply of water in such ditch to such an extent as in his judgment was wasted, or extravagantly, wastefully or wrongfully used. [L. '95, p. 197, §1.

§ 654. (2384*b*) Misdemeanor — Penalty.

Any water commissioner who fails to perform any of the duties imposed upon him by this act shall be deemed guilty of a misdemeanor, and, upon a conviction thereof by a court of competent jurisdiction, shall be fined in a sum not less than fifty ($50.00) dollars nor more than five hundred ($500) dollars. [L. '95, p. 198, §3.

§ 655. (2385) Interfering With Adjusted Head-gates, etc.

Every person who shall wilfully and without authority open, close, change or intefere [interfere] with any head-gate of any

ditch, or any water box or measuring device of any ditch for the receiving or delivery of water, after the head-gate of the ditch has been adjusted by and is in the control of the water commissioner, or after such water box or measuring device has been adopted by the ditch officer in charge, shall be deemed guilty of a misdemeanor and on conviction thereof shall be fined in a sum not more than $300.00, or imprisonment in the county jail not exceeding sixty days, or both such fine and imprisonment, in the discretion of the court.

Any person who shall be found using water taken through any such head-gate, water box or measuring device so unlawfully interfered with, shall *prima facie* be deemed guilty of a violation of this section. [L. '01, pp. 196-197, §1, amending 1 Mills', §2385.

§ 656. (2385*a*) Jurisdiction—Appeal.

Justices of the peace shall have jurisdiction to hear, try and determine actions brought for violations of this act, subject to the right of appeal as provided for in cases of assault and battery. [L. '01, p. 197, §2.

An Act to give police powers to water commissioners, fix their salaries, define their duties, and provide for their assistants, and to repeal certain parts of acts inconsistent herewith.—*Approved and in force March* 25, 1889. L. '89, p. 469.

§ 657. (2386) Power of Water Commissioners—State Engineer.

Water commissioners shall, in the discharge of their duties, be invested with the powers of constables, and may arrest any person violating his [their] orders relative to the opening or shutting down of head-gates, or the using of water for irrigation purposes, and take such offender before the nearest justice of the peace, who may, if such offender be convicted, fine him in any sum not exceeding one hundred dollars, and, in default of the payment of such fine, may imprison him in the county jail not exceeding thirty days; Provided, That the orders of the superintendents of irrigation in their respective divisions, and the orders of the state engineer, shall be held at all times superior to the orders of water commissioners, and shall relieve any person acting in accordance with such superior orders from the penalties herein provided; And Provided, also, That in like manner the orders issued by the state engineer shall be held superior to any order issued by any superintendent of irrigation. [L. '89, p. 469, §1.

§ 658. (2387) Pay of Water Commissioners—Verified Account.

The water commissioners shall be entitled to pay at the rate of five (5) dollars per day for each day he shall actually be employed in the duties of his office, and be paid by the county or counties in which his irrigating district may lie. Each water commissioner shall keep a just and itemized account of the time spent by him in the duties of his office, and shall present a true copy thereof, verified by oath, to the board of county commissioners of the county in which his district may lie, and said board of commissioners shall allow the same; and if said irrigation district shall extend into two or more counties, then such water

commissioner shall present his account for his services, verified as aforesaid, to the board of county commissioners into which his district extends, and each board of county commissioners shall pay its *pro rata* share thereof. [L. '89, p. 470, §2.

§ 659. (2388) Employ Suitable Assistance—Pay.

The water commissioner is hereby given power, whenever he shall deem it necessary, to employ a suitable assistant, or assistants, to aid him in the discharge of his duties; such assistant or assistants, shall take the same oath as water commissioner, and shall obey his instructions, and shall be entitled to pay at the rate of two dollars as [and] fifty cents ($2.50) per day for every day they are so employed, to be paid by county commissioners upon the certificates of the water commissioners. [L. '89, p. 470, §3.

§ 660. (2388*a*) Deputies—Compensation.

The water commissioner is hereby authorized to appoint not to exceed two deputies to speedily make the examinations provided for in section 1 of this act, who shall be entitled to the same compensation, and to be paid in the same manner as is by law provided for the payment of other deputy water commissioners. [L. '95, pp. 197-198, §2.

§ 661. (2389) Itemized Account of Time.

Each water commissioner shall keep an itemized account of the time of each assistant by him employed, and shall certify the same to the board of county commissioners, who shall pay such assistant, or assistants, in the same manner as provided for payment of water commissioners in section 2 of this act. [L. '89, p. 470, §4.

§ 662. (2390) Repeal.

That section 1 of an act, entitled "An act to amend and [an] act entitled an act to regulate the use of water for irrigation, and providing for settling the priority of rights thereto, and for payment of the expenses thereof, and for payment of all costs and expenses incident to said regulations of use," approved February 19, 1879; approved April 9, 1885; and also section 41 of an act, entitled "An act to regulate the use of water for irrigation, and providing for settling the priority of rights thereto, and for payment of the expenses thereof, and for payment of all costs and expenses incident to said regulation of use," approved February 19, 1879, and all other acts inconsistent herewith, are hereby repealed. [L. '89, p. 470, §5.

§ 663. (2391) Commissioner Devote Entire Time to Duties—Penalty for Neglect.

It is hereby made the duty of the water commissioner, after being called upon to distribute water, to devote his entire time to the discharge of his duties when such duties are required, so long as the necessities of irrigation in his district shall require; and it is made his duty to be actively employed on the line of the stream or streams in his water district, supervising and directing the putting in of head-gates, waste-gates, keeping the stream

clear of unnecessary dams or other obstructions, and such other duties as pertain to a guard of the public streams in his water district; and for willful neglect of his duty, he shall be liable to fifty dollars fine, with costs of suit. [L. '89, p. 471, §6.

§ 664. (2392) Commissioner Begin Work When Called On.

Said water commissioners shall not begin their work until they shall be called on by two or more owners or managers, or persons controlling ditches in their several districts, by application in writing, stating that there is necessity for their action; and they shall not continue performing services after the necessity therefore [therefor] shall cease. [L. '79, pp. 107, 108, §43; G. S. '83, pp. 570, 571, §1758.

DIVISION VI.—OFFENSES—TAKING WATER—TAXATION.

An Act to punish for breaking or disturbing the gates or banks of ditches, canals, reservoirs and feeders thereof.—*Approved February* 12, 1881. *In force May* 13, 1881. L. '81, p. 163.

§ 665. (2393) Cutting or Breaking Gate, Bank, Side of Ditch, Flume, etc.—Penalty.

Any person or persons who shall knowingly and willfully cut, dig, break down or open any gate, bank, embankment or side of any ditch, canal, flume, feeder or reservoir in which such person or persons may be a joint owner, or the property of another, or in the lawful possession of another or others, and used for the purpose of irrigation, manufacturing, mining or domestic purposes, with intent maliciously to injure any person, association or corporation, or for his or her own gain, unlawfully, with intent of stealing, taking or causing to run or pour out of such ditch, canal, reservoir, feeder or flume, any water for his or her own profit, benefit or advantage, to the injury of any other person, persons, association or corporation, lawfully in the use of such water or of such ditch, canal, reservoir, feeder or flume, he, she or they so offending shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined in any sum not less than five dollars nor more than three hundred dollars, and may be imprisoned in the county jail not exceeding ninety days. [L. '81, p. 163, §1; G. S. '83, p. 571, §1759.

§ 666. (2394) Jurisdiction of Justices of the Peace.

Justices of the peace shall have jurisdiction of all offenses under the provisions of this act, saving to any party defendant the right to be tried by a jury as in other criminal cases before such justices, now provided for by law; and also the right to appeal in manner and form as by law, now, or hereafter to be provided for by law, in criminal cases before such justices. [L. '81, p. 163, §2; G. S. '83, p. 571, §1760.

An Act to provide for the better protection of water rights, and to declare a liability in damages for the infringement thereof. —*Approved April* 4, 1887. *In force July* 4, 1887. L. '87, p. 312.

§ 667. (2395) No Person to Receive More Water Than He is Entitled To.

That it shall be the duty of every person, who is entitled to take water for irrigation purposes, from any ditch, canal, or reservoir, to see that he receives no more water from such ditch, canal, or reservoir through his head-gate, or by any ways or means whatsoever, than he is entitled to, and that he shall, at all times, take every precaution to prevent more water than he is entitled to, coming from such ditch, canal, or reservoir, upon his land. [L. '87, p. 312, §1.

§ 668. (2396) Duties of Parties Taking Water—Liability—Damages—Costs.

That it shall be the duty of every such person, taking water from any ditch, canal, or reservoir, to be used for irrigation purposes, on finding that he is receiving more water from such ditch, canal, or reservoir, either through his head-gate, or by means of leaks, or by any means whatsoever, immediately to take steps to prevent his further receiving more water from such ditch, canal, or reservoir, than he is entitled to, and if knowingly he permits such extra water to come upon his land, from such ditch, canal, or reservoir, and does not immediately notify the owner or owners of such ditch, or take steps to prevent its further flowing upon his land, he shall be liable to any person, company, or corporation, who may be injured by such extra appropriation of water, for the actual damage sustained by the party aggrieved; which damages shall be adjudged to be paid, together with the costs of suit, and a reasonable attorney's fee, to be fixed by the court and taxed with the costs. [L. '87, p. 312, §2.

§ 669. (2397) Ditches Free From Taxation.

That all ditches used for the purpose of irrigation, and that only where the water is not sold for the purpose of deriving a revenue therefrom, be and the same are hereby declared free from all taxation, whether for state, county or municipal purposes. [L. '72, p. 143, §1; G. L. '77, p. 517, §1384; G. S. '83, p. 571, §1761.

An Act imposing a penalty for the bribing of persons in charge of the distribution of water.—*Approved April* 19, 1889. *In force July* 19, 1889. L. '89, p. 39.

§ 670. (2398) Dishonest Distribution of Water—A Misdemeanor—Penalty.

Any water commissioner, or any deputy water commissioner, assistant, water master, superintendent, ditch rider or other person in charge of the divisions or distributions of water, whether from the public stream or from any ditch or canal, who shall take or receive any money, promises or favors, or any thing of value, intended to influence him dishonestly to favor, or cause water to accrue or run to any person or persons' advantage, benefit or gain, detrimental to the rights of others, shall be deemed guilty of a misdemeanor and shall be fined in any sum not less than fifty (50) dollars nor more than three hundred (300) dollars.

Any person giving or offering any such money, promises, or favors, or any other thing of value to any of such above-named persons, with intent as aforesaid, shall likewise be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine in any sum not less than fifty (50) dollars nor more than three hundred (300) dollars; and any fines so collected shall be paid into the school funds of the county wherein such fines are collected. [L. '89, p. 39, §1.

DIVISION VII.—ADJUDICATION OF WATER RIGHTS BETWEEN DITCHES.

An Act to make further provisions for settling the priority of rights to the use of water for irrigation; in the district and supreme courts; and for making record of such priorities; and for payment of costs and expenses incident thereto.—*Approved and in force February* 23, 1881. L. '81, p. 142.

§ 671. (2399) Jurisdiction of Courts—How Vested.

For the purpose of hearing, adjudicating and settling all questions concerning the priority of appropriation of water between ditch companies and other owners of ditches drawing water for irrigation purposes from the same stream or its tributaries within the same water district, and all other questions of law and questions of right growing out of or in any way involved or connected therewith, jurisdiction is hereby vested exclusively in the district court of the proper county; but when any water district shall extend into two or more counties, the district court of the county in which the first regular term after the first day of December in each year shall soonest occur, according to the law then in force, shall be the proper court in which the proceedings for said purpose, as hereinafter provided for, shall be commenced; but where said proceedings shall be once commenced, by the entry of an order appointing a referee in the manner and for the purpose hereinafter in this act provided, such court shall thereafter retain exclusive jurisdiction of the whole subject until final adjudication thereof is had, notwithstanding any law to the contrary now in force. [L. '79, pp. 99, 100, §19; G. S. '83, pp. 571, 572, §1762. For continuation of this act see §676 hereof.

An Act concerning water rights.—*Approved April* 11, 1903. *In force July* 11, 1903. L. '03, p. 297, ch. 130.

§ 672. (2399a) Water Rights—Established and Decreed.

That the owner or owners of any water rights derived from any natural stream, water-course or any other source, acquired by appropriation and used for any beneficial purpose other than irrigation, may have his or their right thereto established and decreed by the district court having jurisdiction of the adjudication of water rights for irrigation purposes in the water district in which said water rights are situated, by petitioning said court in the same manner and by complying with the procedure and the requirements of the law now applicable to the adjudication of water rights for irrigation purposes. [L. '03, p. 297, §1. This

act, consisting of §§672-675, relates to adjudication for purposes other than irrigation. Adjudication for irrigation is represented by §§671 and 676, *et seq.*, hereof.

§ 673. (2399b) Water Rights Numbered—Appropriation.

The said district court shall number, consecutively and chronologically, all such water rights similar to the system of numbering priorities for irrigation purposes, designating the amount of each appropriation in cubic feet per second of time; and shall specifically state the particular purpose for which such appropriation is granted, that is, whether the same is for power or manufacturing purposes, domestic use, storage purposes, or any other beneficial use of said waters. All of such appropriations, other than appropriations for irrigation purposes, shall be designated by and in the one series of consecutive numbers herein provided for. [L. '03, pp. 297-298, §2.

§ 674. (2399c) Protection of Vested Rights.

In determining such water rights, it shall be the duty of the court to recognize and protect, as far as possible under the constitution of this state and the decisions of the appellate courts applicable thereto, the vested rights of all appropriators of water for irrigation purposes, especially where such rights have been duly adjudicated by the said court in the statutory proceeding for the determination of the priority of rights to the use of water for irrigation purposes. [L. '03, p. 298, §3.

§ 675. (2399d) Distribution—Compensation—Proviso.

It shall be the duty of the water commissioner in each water district to distribute the waters decreed hereunder and to protect the priority rights of the respective owners of water rights for any beneficial purposes from and after their determination by said court, in the same manner as he is now required by law to superintend the distribution of waters throughout his district for irrigation purposes, and he shall receive like compensation for such services from the county in which such water rights are situated; and other counties embraced in his water district shall not be liable for any portion of such service; Provided, further, That no water commissioner or irrigation official shall make any division or distribution of any water between the users thereof from the same ditch or reservoir. [L. '03, p. 298, §4.

An Act in relation to notice in water right proceedings.—*Approved April* 10, '05. *In force April* 10, '05. L. '05, p. 244-5. *Be it Enacted by the General Assembly of the State of Colorado:*

§ 676. (1) That in all water right adjudication proceedings brought under the statutes of this state for determining and decreeing priority rights to the use of water for irrigation or any other beneficial purpose, or for the transfer of an adjudicated water right, after a general decree has been entered in such water district, in pursuance of the statutory notice by publication and posting, as now required by law, no further publication or posting of such notice or any notice of such individual subsequent proceedings

shall be required unless by order of court upon good cause shown therefor; and in all such proceedings subsequent to the entry of such general decree, written notice shall be given for such length of time and be served upon the parties interested adversely in such manner as is now or may hereafter be provided by law for the service of summons in other civil cases; or in such reasonable time and manner as may be fixed by rule of court; Provided, Such notice shall contain the date and amount of the priority right claimed in each case, the source of supply from which same shall be taken, and in case of a transfer of a water right the notice shall contain a brief description of the water right sought to be transferred, the place and ditch, if any, from which and to which the change is desired, and which notice shall give the date that the hearing will be had, and be served not less than fifteen days prior to the date of such hearing; and which notice shall be dated and may be signed and issued either by the attorney for the petitioner or by the clerk of the district court. This act shall not be construed as a repeal of any of the statutes now existing relative to notice in any water right proceedings; and in any proceeding for any of the purposes herein set forth the petitioner may, at his election, proceed under this act, or under the statutes in force at the time of the passage of this act. [L. '05, pp. 244-5, §1.

§ 677. (2400) Filing Statements of Claim—Ditch, Name, Description—P. O. Address.

In order that all parties may be protected in their lawful rights to the use of water for irrigation, every person, association or corporation owning or claiming any interest in any ditch, canal or reservoir, within any water district, shall, on or before the first day of June, A. D. 1881, file with the clerk of the district court having jurisdiction of priority of right to the use of water for irrigation in such water district, a statement of claim, under oath, entitled of the proper court, and in the matter of priorities of water rights in district number —, as the case may be, which statement shall contain the name or names, together with the post-office address of the claimant or claimants claiming ownership, as aforesaid, of any such ditch, canal or reservoir, the name thereof (if any), and, if without a name, the owner or owners shall choose and adopt a name, to be therein stated, by which such ditch, canal or reservoir shall thereafter be known, the description of such ditch, canal or reservoir as to location of headgate, general course of ditch, the name of the natural stream from which such ditch, canal or reservoir draws its supply of water, the length, width, depth and grade thereof, as near as may be, the time, fixing a day, month and year as the date of the appropriation of water by original construction, also by any enlargement or extension, if any such thereof may have been made, and the amount of water claimed by or under such construction, enlargement or extension, and the present capacity of the ditch, canal or feeder of reservoir, and also the number of acres of land lying under and being or proposed to be irrigated by water from such ditch, canal or reservoir. Said statement shall be signed by the proper party or parties. [L. '81, pp. 142, 143, §1; G. S. '83, p. 572, §1763. For first section of this act, see §671 hereof.

§ 678. (2401) Secretary of State Make Publication—Publisher's Certificate.

The secretary of state shall, without delay, after the passage of this act cause a certified copy of the foregoing section, giving the date of the approval of this act, to be published in one of the public newspapers published in such county in which part or portion of any water district is or shall be established by law at the time of such publication; and said section 1 shall be published as aforesaid, once in each and every week continuously in said paper until said first day of June, A. D. 1881, and in case in the meantime any one of said papers shall cease to be published, then such publication shall be made in some other paper in same county (if any), and on conclusion of such publication such publisher of such paper shall deliver to the secretary of state his sworn certificate of publication in duplicate showing that such publication has been made in his paper in compliance with the preceding section hereof, and stating the first and last day of such publication; and he shall thereupon be entitled to receive from the secretary of state a certificate of the amount due him for such publication, on presentation of which to the auditor of state he shall draw his warrant for the amount in favor of the holder on the state treasurer, who shall pay the same according to law. [L. '81, pp. 143, 144, §2; G. S. '83, pp. 572, 573, §1764.

§ 679. (2402) Secretary's Certificate—Where Filed—Effect.

The secretary of state shall file one of said duplicate certificates of publication with the clerk of the district court having jurisdiction of priority of rights to use of water for irrigation in the proper water district, certifying officially that such publication therein mentioned was duly authorized by him, and said clerk shall file the same with the statement of claim provided for in section 1 hereof, and such certificate of such publisher or any additional certificate of same publisher to same fact in case of loss of the original, shall be proof of the proper publication of said section in the paper therein mentioned. Said secretary of the state shall also certify to such clerk of the several district courts having jurisdiction of said priorities of right to use of water for irrigation throughout the state, the names of the newspapers, and of the county in which he caused such publication to be made, and that the duplicate certificate of publication of the publisher, as herein required, are [is] on file in his office, and said certificate shall be sufficient proof of the publication of said section 1 hereof, as by this act required. [L. '81, p. 144, §3; G. S. '83, p. 573, §1765.

§ 680. (2403) Proceedings in Court—Order—Evidence—Examination—Proofs—What Facts—Decree—Certificate of Clerk.

When, at any time after the first day of June, A. D. 1881, any one or more persons, associations or corporations, interested as owners of any ditch, canal or reservoir in any water district shall present to the district court of any county having jurisdiction of priority of rights to the use of water for irrigation in such water district according to the provisions of an act entitled an act to regulate the use of water for irrigation and providing for settling the priority of rights thereto, and for payment of the ex-

penses thereof, and for payment of all costs and expenses incident to said regulation of use, or to the judge thereof in vacation, a motion, petition or application in writing, moving or praying said court to proceed to an adjudication of the priorities of rights to use of water for irrigrtion between the several ditches, canals and reservoirs in such district, the court, or judge thereof in vacation, shall, without unnecessary delay, in case he shall deem it practicable to proceed in open court, as prayed for, by an order to be entered of record upon such motion, petition or application, appoint a day in some regular or special term of said court, for commencing to hear and take evidence in such adjudication, at which time it shall be the duty of the court to proceed to hear all evidence which may be offered by or on behalf of any person, association or corporation, interested in any ditch, canal or reservoir, in such district, either as owner or consumer of water therefrom, in support of or against any claim or claims of priority of appropriation of water made by means of any ditch, canal, or reservoir, or by any enlargement or extension thereof in such district, and consider all such evidence, together with any and all evidence, if any, which may have been heretofore offered and taken in such district in the same matter by any referee heretofore appointed under the provisions of said act above herein mentioned, and also the arguments of parties or their counsel, and shall ascertain and find from such evidence, as near as may be, the date of the commencement of such ditch, canal or reservoir, together with the original size and carrying capacity thereof as originally constructed, the time of the commencement of each enlargement or extension thereof, if any, with the increased capacity thereby occasioned, the time spent, severally, in such construction and enlargement, or extension, and re-enlargement, if any, the diligence with which the work was in each case prosecuted, the nature of the work as to difficulty of construction, and all such other facts as may tend to show the compliance with the law, in acquiring the priority of right claimed for each such ditch, canal or reservoir, and determine the matters put in evidence, and make and cause to be entered a decree determining and establishing the several priorities of right, by appropriation of water, of the several ditches, canals and reservoir [reservoirs] in such water district, concerning which testimony shall have been offered, each according to the time of its said construction and enlargement, or enlargements or extensions, with the amount of water which shall be held to have been appropriated by such construction and enlargements, or extensions, describing such amount by cubic feet per second of time, if the evidence shall show sufficent data to ascertain such cubic feet, and if not, by width, depth and grade and such other description as will most certainly and conveniently show the amount of water intended as the capacity of such ditch, canal or reservoir, in such decree. Said court shall further order that each and every party interested or claiming any such ditch, canal or reservoir, shall receive from the clerk, on payment of a reasonable fee therefor, to be fixed by the court, a certificate under seal of the court showing the date or dates and amount or amounts of appropriations adjudged in favor of such ditch, canal or reservoir, under and by virtue of the construction, extension and enlargements thereof, severally; also specifying the number of said ditch and of each priority to which

the same may be entitled by reason of such construction, extension and enlargements. [L. '81, pp. 144-146, §4; G. S. '83, pp. 573, 574, §1766.

§ 681. (2404) Copy of Decree, Authority of Commissioner—Recording—Copy—Evidence.

The holder of such certificate shall exhibit the same to the water commissioner of the district when he commences the exercise of his duties, and such water commissioner shall keep a book in which shall be entered a brief statement of the contents of such certificate, and which shall be delivered to his successor, and said certificate, or statement thereof in his book, shall be the warrant of authority to said water commissioner for regulating the flow of water in relation to such ditch, canal or reservoir. Said certificate shall be recorded, at the same rates of charges as in cases of deeds of conveyance, in the records of each county into which the ditch, canal or reservoir, to which such certificate relates, shall extend, and said certificate, or said record thereof, or a duly certified copy of such record, shall be *prima facie* evidence of so much of said decree as shall be recited therein, in any suit or proceeding in which the same may be relevant. [L. '81, pp. 146, 147, §5; G. S. '83, pp. 574, 575, §1767.

§ 682. (2405) Clerk Publish Notice—Post Copy—Ten Copies Posted by Party Petitionin .

Notice shall be given by the clerk of said court, of the time so appointed, by publishing the same in one public newspaper in such county into which such water district may extend; which notice shall be so published in such paper once in each week until four successive weekly publications shall have been made, the last of which shall be on a day previous to the day appointed as aforesaid. Said notice shall contain a copy of said order, and shall notify all persons, associations and corporations interested as owners in any ditch, canal or reservoir in such water district, to appear at said court at the time so appointed and file a statement of claim under oath, in case no statement has been before filed by him, her or them, showing the ditch, canal or reservoir, or two or more such, in which he, she or they claim an interest, together with the names of all the owners thereof, which statement may be made by any one of the owners of such ditch, canal or reservoir, for and in behalf of all; and also that all persons interested as owners or consumers may then and there present his, her or their proofs for or against any priority of right of water by appropriation sought to be shown by any party by or through any such ditch, canal or reservoir (either as owner or consumer of water drawn therefrom). Ten printed copies of said notice shall also be posted in ten public places in such water district, not less than twenty days before the day so appointed, which copies shall be so posted by the party or parties moving the adjudication. [L. '81, p. 147, §6; G. S. '83, p. 575, §1768; see §687.

§ 683. (2406) Proof of Publication—Of Posting Copies—Entry by Clerk.

Proof of the proper publication of said notice or notices in said public papers shall consist in such case of the sworn certificate

of the publisher of such newspaper, showing the publication to have been made in accordance with the provisions of section 3 of this act, which certificates shall be procured by the party or parties moving the adjudication, at his or their expense, and on said certificate being filed the clerk shall enter the amount of the printer's fee therefor as costs advanced by the party procuring the same, which sum shall be counted to his, her or their credit in distribution of costs. Proof of the posting of said printed copies shall be made by the affidavit of some credible person, certified to be such by the clerk or other officer administering the oath, showing when, where and how said copies were posted. [L. '81, pp. 147, 148, §7; G. S. '83, p. 575, §1769.

§ 684. (2407) Notices Served on All Parties—How Served—Notice by Mail.

The party or parties moving such adjudication shall cause a printed or written copy of the notice aforesaid, published as aforesaid, to be served on every person, association or corporation shown by the statement of claim on file, as provided in section 1 hereof, which service shall be made within ten days from the time of the first publication by the clerk, by any credible person certified by said clerk or referee to be such, by delivering such copy as aforesaid to the person to be served, if such person, by due diligence, can be found in the county of his residence. If such person can not be found, as aforesaid, then, by leaving such copy at his or her usual place of residence, if he or she have such residence, in charge of some person of the age of fourteen years or over, there residing; and on any corporation, by delivering the copy to the president, or vice-president, or secretary, or treasurer thereof, or the manager, or superintendent in charge of their ditch, canal or reservoir, or authorized agent or attorney, or by leaving such copy at the office or usual place of business of such corporation, and the proof of such service shall be made by affidavit of the person or persons serving said copies, showing when and how such service has been made on such party. In case of parties not served in any manner as aforesaid, the clerk shall deposit in the post-office, duly inclosed in an envelope with the proper postage stamp thereon, a copy directed to the address of such party, shown in the statement of claim aforesaid, filed by him or her under section 1 hereof. [L. '81, pp. 148, 149, §8; G. S. '83, pp. 575, 576, §1770.

§ 685. (2408) Decree—Court Number all Ditches—Reservoirs—Number Appropriations.

The court, in making such decree, as aforesaid, shall number the several ditches and canals in the water district, concerning which adjudication is made, in consecutive order, according to priority of appropriation of water thereby made by the original construction thereof, as near as may be, having reference to the date of each decree as rendered, and shall also number the reservoirs in like manner, separately from ditches and canals, and shall further number each several appropriation of water consecutively, beginning with the oldest appropriation, without respect to the ditches or reservoirs by means of which such appropriations were made; whether such appropriation shall have been

made by means of construction, extension or enlargement, which number of each ditch, canal or reservoir, together with the number or numbers of any appropriations of water held to have been made by means of the construction, extension or enlargement thereof, shall be incorporated in said decree and certificate of the clerk, to be issued to the claimants, as provided in section 1 of this act, so as to show the order in priority of such ditch or canal, and of such reservoir, and also of such successive appropriation of water pertaining thereto, for the information of the water commissioner of the district in distributing water; such numbering to be as near as may be having reference to date of decrees as rendered. [L. '81, p. 149, §9; G. S. '83, p. 576, §1771.

DIVISION VIII.—REFEREE IN ADJUDICATION OF WATER RIGHTS BETWEEN DITCHES.

§ 686. (2409) When Court May Appoint Referee—What Referred.

If for any cause the judge of said court shall deem it impracticable or inexpedient to proceed to hear such evidence in open court, he shall, instead of the order mentioned in section 4 of this act, make and cause to be entered of record an order appointing some discreet person, properly qualified, a referee of said court, to whom shall be referred the statement of claim aforesaid on file in said matter, the matter of taking evidence and reporting the same, making an abstract and findings upon the same, and preparing a decree in said adjudication; and also in case of any water district in which a referee has been heretofore appointed, and evidence taken by him under the provisions of the act, the title of which is recited in section 4 of this act; such evidence so already taken, together with the abstract thereof, and report to the referee who took the same, shall be also referred to said referee, to be appointed as aforesaid, and he shall proceed with his duties as hereinafter provided, first taking an oath [of] office, such as is required to be taken by referees in other cases under the provisions of the code of civil procedure. [L. '81, pp. 149, 150, §10; G. S. '83, pp. 576, 577, §1772.

§ 687. (2410) Referee's Notice—Contents—How Published—Posting Copies.

Said referee shall prepare and publish a notice containing a copy of the order appointing him, in which notice he shall appoint a time or times, and place or places, suitable and convenient for the claimants in such water district, at which he will attend for the purpose of hearing and taking evidence touching the priority of right of the several ditches, canals and reservoirs in said district, and notifying all persons, associations and corporations interested as owners or consumers of waters [water] to attend by themselves, their agents or attorneys, at the times and places appointed in said notice, and notifying such owners to then and there file a statement of claim in case such statement has not been already filed under the provisions of section 1 hereof, such as mentioned in section 6 hereof, and present their proofs touching any priority of right claimed by them for any ditch, canal or reser-

voir in said district, which notice shall be published in the same manner and times, and in all respects according to the provisions for publication of newspaper notices mentioned in section 6 of this act, and proof of such publication shall be made in same manner as is provided in section 7 of this act; and he shall also post ten or more printed copies of such notice in ten or more public places in said district, which copies shall be so posted at least twenty days before the time of commencing to take said evidence. [L. '81, p. 150, §11; G. S. '83, p. 577, §1773.

§ 688. (2411) Proof of Posting Notices.

Proof of the posting of said copies shall be made by the affidavit of said referee or other person certified by him to be a credible witness, which shall show when, where and how the said copies were posted, and shall be filed by him with his report. [L. '81, p. 151, §12; G. S. '83, p. 577, §1774.

DIVISION IX.—PROCEEDINGS BEFORE REFEREE IN ADJUDICATION OF WATER RIGHTS BETWEEN DITCHES.

§ 689. (2412) Who May Offer Evidence—Former Evidence.

Said referee shall attend at the times, and places mentioned in his said notice for the purpose therein mentioned; and all persons, associations, choosing to do so, and being interested as owners of or consumers of water from any ditch, canal or reservoir in said district, and may also attend by themselves, their agents or attorneys, before said referee, at some one or more of said times and places so appointed, and shall have right to offer any and all evidence they may think advisable for their interests in the matter to be adjudicated, as well in districts in which evidence has been heretofore taken as in other districts. All such evidence as has been heretofore taken, if any, in such district, shall be kept present by said referee, subject to inspection by any party desiring to examine the same for purposes of the investigation. [L. '81, p. 151, §13; G. S. '83, pp. 577, 578, §1775.

§ 690. (2413) Powers and Duties of Referee—Books and Records, Evidence.

Said referee shall have power to administer oaths to all witnesses, and to issue subpœnas for witnesses and subpœnas *duces tecum*, which subpœnas may be served by any party, or constable, or sheriff, or deputy sheriff, and may require witnesses to appear at any of the places appointed by said referee for taking evidence. He shall permit all witnesses to be examined by the parties calling them respectively and to be cross-examined by any party interested, and he shall take all testimony in writing and note all objections offered to any part of the testimony taken, with the cause assigned for the objection, and shall proceed in all other respects as in case of taking depositions. He shall certify all books and papers offered by any one in his own behalf, and preserve them with the testimony offered concerning the same, and in case of books and papers offered in evidence, which shall not be under the control of the party desiring the evidence

for which such books may be offered, said referee shall make a true copy of the parts demanded and certify the same, and preserve the same, together with the evidence offered concerning the same and concerning said books and papers, as part of the evidence in the matter. [L. '81, pp. 151, 152, §14; G. S. '83, p. 578, §1776.

§ 691. (2414) Refusal to Produce Books or Papers—Effect.

No person, association or corporation willfully refusing to produce any book or paper, if in his or their power to do so, when rightfully demanded for examination and copying, shall be allowed the benefit of any testimony or proofs in his, her or their behalf, in making final adjudication, if the court shall be satisfied, from all the evidence shown concerning such refusal, that the same was willful. [L. '81, p. 152, §15; G. S. '83, p. 578, §1777.

§ 692. (2415) What Facts to be Ascertained by Proofs.

Said referee shall also examine all witnesses to his own satisfaction, touching any point involved in the matter in question, and shall ascertain as far as possible the date of the commencement of each ditch, canal or reservoir, with the original size and carrying capacity thereof, the time of the commencement of each enlargement thereof, with the increased carrying capacity thereby occasioned, the length of time spent in such construction or enlargement, the diligence with which the work was prosecuted, the nature of the work as to difficulty of construction, and all such other facts as may tend to show compliance with the law in acquiring the priority of right claimed for said ditch, canal or reservoir; and upon all the facts so obtained shall be determined the relative priorities among the several ditches, canals and reservoirs, the volume or amount of water lawfully appropriated by each, as well as by means of the construction, as by the enlargements thereof, and the time when each such several appropriations took effect. [L. '81, p. 152, §16; G. S. '83, p. 578, §1778.

§ 693. (2416) Disturbing Proceedings—Penalty.

Every person present before said referee at any time when he shall be engaged in hearing testimony, who shall willfully disturb the proceedings; and every person who shall willfully refuse or neglect to obey any subpœna issued by said referee, when his lawful fees shall be tendered him for his attendance before the referee, shall be guilty of contempt of the court appointing such referee, and on complaint under oath of the referee or other person, before the said district court, or judge thereof in vacation, may be brought before the court or judge and dealt with accordingly. [L. '81, pp. 152, 153, §17; G. S. '83, pp. 578, 579, §1779.

§ 694. (2417) Fees of Witnesses—By Whom Paid.

Every witness who shall attend before said referee under subpœna by request of any party, shall be entitled to the same fees and mileage as witnesses before the district court in the county in which he shall so attend, and shall be paid by the party requiring his testimony. [L. '81, p. 153, §18; G. S. '83, p. 579, §1780.

§ 695. (2418) Duties of Referee—Rights of Parties—Adjournment —Notice.

The said referee shall take all the testimony offered, and for that purpose shall give reasonable opportunity to all parties to be heard, and may at any place, when the time limited thereat shall expire, adjourn the further taking of testimony then proposed or desired to be offered to the next place in order, according to his said published appointments, and at the last place may continue until all testimony shall be taken, or make further appointments at any former place or places as may seem best and most convenient for all parties, giving reasonable notice thereof. [L. '81, p. 153, §19; G. S. '83, p. 579, §1781.

§ 696. (2419) Referee Shall Examine all Testimony—Numbering —Findings—Decree—Report.

Said referee, upon closing the testimony, shall proceed to carefully examine the same, together with all testimony and proofs which may have been heretofore taken by any former referee in the same district, if any such shall have been taken, under the provisions of said act, the title of which is recited in section 4 of this act; he shall make an abstract of all the testimony and proofs in his possession concerning each ditch, canal and reservoir separately, and shall number each ditch and canal in order, and likewise each reservoir, each class consecutively, and also number the several appropriations of water shown by the evidence, all in manner and form as provided in section 9 hereof, and shall make a separate finding of all the facts connected with each ditch, canal and reservoir, touching which evidence shall have been offered; and he shall prepare a draft of a decree in accordance with his said findings, in substance the same as the decree mentioned in section 4 of this act, and conformable also to the provisions of section 9 hereof, so far as the same are applicable; which decree, so prepared by him, shall be returned with his report to the court, and he shall file his report with said evidence, abstract and findings, and said decree, with the clerk of the court, and inform the judge of so doing, without delay. [L. '81, pp. 153, 154, §20; G. S. '83, p. 579, §1782.

§ 697. (2420) Filing Report—Court Proceed to Determine—Exceptions—Approval—Entry.

Upon the filing of said report the court, or judge thereof in vacation, shall cause an order to be entered setting some day in a regular or special term of said court as soon as practicable, when the court will proceed to hear and determine the report; at which time any party interested may appear by himself or counsel and move exceptions to any matter in the findings or decree made by said referee, and after hearing the same the court shall, if the decree reported be approved, cause the same to be entered of record, or otherwise such modifications thereof or other decree as shall be found just and conformable to the evidence and the true intent of this act, and to so much of any and all former laws of the state as shall be adjudged consistent herewith. [L. '81, p. 154, §21; G. S. '83, pp. 579, 580, §1783.

DIVISION X.—GENERAL PROVISIONS IN ADJUDICATION OF WATER RIGHTS BETWEEN DITCHES.

§ 698. (2421) Failure to Offer Evidence—Water Commissioner Disregard Claims Until, etc.—Party Obtain Decree and Present Certificate.

No claim of priority of any person, association or corporation on account of any ditch, canal or reservoir, as to which he, or she, or they shall have failed or refused to offer evidence under any adjudication herein provided for or heretofore provided for by said act, the title of which is recited in section 4 hereof, shall be regarded by any water commissioner in distributing water in times of scarcity thereof, until such time as such party shall have by application to the court having jurisdiction, obtained leave and made proof of the priority of right to which such ditch, canal or reservoir shall be justly entitled, which leave shall be granted in all cases upon terms as to notice to other parties interested, and on payment of all costs, and upon affidavits or petition sworn to, showing the rights claimed and the ditches, canals and reservoirs, with the names of the owners thereof against which such priority is claimed, nor until a decree adjudging such priority to such ditch, canal or reservoir has been entered, and certificate, such as mentioned in section 4 hereof, shall have been issued to claimant and presented to the water commissioner. [L. '81, pp. 154, 155, §22; G. S. '83, p. 580, §1784.

§ 699. (2422) Rights of Parties Against Referee for Neglect, Oppression, etc.

Every party interested shall have the right to complain to the court of any act of willful neglect or oppression on the part of the said referee in exercising his powers under this act, whereby such party shall have been aggrieved, either by refusal of said referee to hear or take evidence offered, or by preventing reasonable opportunity to offer such evidence; and the court may order such proceedings in the premises as will give redress of the grievance, at the cost of said referee, if he appear willfully in fault; otherwise, in case of accident or mistake, costs shall be awarded as to the court shall seem just. [L. '81, p. 155, §23; G. S. '83, p. 580, §1785.

§ 700. (2423) Power of Court to make Just Rules—Law Construed Liberally.

The district court, or judge thereof in vacation, shall have power to make all orders and rules consistent with this act which may be found necessary and expedient, from time to time during the progress of the case, for carrying out the intent of this act, and of all parts consistent therewith of the said act, the title of which is recited in section 4 hereof; as well touching the proceedings in court as of the acts and doings of said referee, for the purpose of securing to any party aggrieved by the acts of said referee or any proceeding of the court, opportunity for redress; and this act shall be construed liberally in all courts, in favor of securing to all persons interested the just determination and protection of their rights. [L. '81, p. 155, §24; G. S. '83, pp. 580, 581, §1786.

§ 701. (2424) Party Must File Claim Before Offering Evidence.

No persons, association or corporation representing any ditch, canal or reservoir, shall be permitted to give or offer any evidence before said referee, until he, she or they shall have filed a statement of claim in substance the same in all respects as is required to be filed under the provisions of section 1 hereof. [L. '81, p. 155, §25; G. S. '83, p. 581, §1787.

§ 702. (2425) Re-argument—Review—Limitation Two Years.

The district court, or judge thereof in vacation, shall have power to order, for good cause shown, and upon terms just to all parties, and in such manner as may seem meet, a re-argument or review, with or without additional evidence, of any decree made under the provisions of this act, whenever said court or judge shall find from the cause shown for that purpose by any party or parties feeling aggrieved, that the ends of justice will be thereby promoted; but no such review or re-argument shall be ordered unless applied for by petition or otherwise within two years from the time of entering the decree complained of. [L. '81, p. 156, §26; G. S. '83, p. 581, §1788.

§ 703. (2426) Testimony.

Whenever testimony shall or may be taken, in any district created by this act, for the purpose of procuring decree as to appropriation of water, and priorities thereof, under the statutes of this state, any testimony theretofore taken, before any former referee, may be introduced, and shall be received as evidence. [L. '85, p. 259, §28.

DIVISION XI.—APPEALS IN ADJUDICATION OF WATER RIGHTS BETWEEN DITCHES.

§ 704. (2427) Who May Appeal—Statement—Approval—Contents—Order—Bond—Conditions.

Any party or parties representing any ditch, canal or reservoir, or any number of parties representing two or more ditches, canals or reservoirs, which are affected in common with each other by any portion of such decree, by which he or she or they may feel aggrieved, may have an appeal from said district court to the supreme court, and in such case the party or parties joining desiring an appeal, shall be the appellants, and the parties representing any one or more ditches, canals or reservoirs affecting in common adversely to the interests of appellants shall be the appellees. The party or parties joining in such appeal shall file a statement in writing, verified by affidavit properly entitled in such cause in the district court, which statement shall show that the appellants claim a valuable interest in the ditch, canal or reservoir, or two or more of such, which are affected in common with each other by some portion of said decree, also stating the name or names, or otherwise the description of the same, and the name or names, or otherwise the description of any one or more other ditches, canals [or] reservoirs, which by said decree derive undue advantage in respect of priority as against that or those represented by appellants; and also setting forth the name or

names of the party or parties claiming such other one or more ditches, canals or reservoirs, affected in common by said decree adversely to the interest of appellant or appellants, and praying that an appeal be allowed against such other parties as appellees. If the court or judge in vacation, on examination, find such statement in accordance with the statements of claim filed by the parties named as appellees, mentioned in section 1 of this act, he shall approve the same and make an order to be prepared and presented by the appellants allowing the appeal and showing the name or names of the appellants and appellees, with the name or names or description of the one or more ditches, canals or reservoirs, claimed by the party or parties appellant and appellee, as shown by their several statements of claim filed as aforesaid, before the taking of testimony, and fix the amount of the appeal-bond, which bond shall be executed by one or more of appellants, as principal or principals, and by sufficient securities, and approved by the court or judge in vacation, and shall be conditioned for the payment of all costs which may be awarded against the appellants or any of them in the supreme court. [L. '81, pp. 156, 157, §27; G. S. '83, pp. 581, 582, §1789.

§ 705. (2428) Copy of Order Served on Appellees—Publication—Posting Copies—Proof.

The order last aforesaid shall be entered of record, and the appellant or appellants shall cause a certified copy thereof to be served on each of the appellees, by delivering the same to him or her, if he or she may be found, or otherwise serving the same in manner the same as may be at the time provided for serving summons from the district court by the laws then in force, and shall also cause the said order to be published in the same manner as the notices required to be published by the referee mentioned in section 11 of this act, and proof of the publication in any newspaper shall be the same as in case of said referee's notice, and proof of the posting of the ten printed copies in the district shall be by affidavit of the party posting the same, with the certificate of the clerk of the district court appealed from, that the affiant is a known and credible person. [L. '81, p. 157, §28; G. S. '83, p. 582, §1790.

§ 706. (2429) Transcript to be Filed in Six Months—Bill of Exceptions.

The appellant or appellants shall file the transcript of record of the district court with the clerk of the supreme court at any time within six months after the appeal shall be allowed as aforesaid. Only so much of the decree appealed from, and so much of the evidence as shall affect the appropriations of water claimed by means of the construction or enlargement or re-enlargement of the several ditches, canals and reservoirs mentioned in the order allowing the appeal, need be copied into the bill of exceptions. [L. '81, pp. 157, 158, §29; G. S. '83, p. 582, §1796.

§ 707. (2430) Costs in Supreme Court.

The supreme court, on dismissal of such appeal, or on affirming or reversing the parts of the decree appealed from, in whole or in part, shall award costs, as in its discretion shall be found and held to be equitable. [L. '81, p. 158, §30; G. S. '83, p. 582, §1792.

§ 708. (2431) Supreme Court Amend or Make New Decree, or Remand with Instructions.

The supreme court, in all cases in which judgment is rendered, and any part of the decree appealed from is reversed, and in which it may be practicable, shall make such decree in the matters involved in the appeal as should have been made by the district court, or direct in what manner the decree of that court shall be amended. [L. '81, p. 158, §31; G. S. '83, p. 582, §1793.

§ 709. (2432) Filing Proof of Service and Notice—Sixty Days—Supreme Court Make Rules.

The said proof of the service and publication of said order allowing the appeal shall be filed with the clerk of the supreme court within sixty days after the making of said order, and if not so filed, the supreme court shall, on motion of the appellee or any of the appellees, at any time after such default in filing said proof, and before the said proof shall be filed, dismiss such appeal, and if the transcript of record be not filed within the time limited by section 29 of this act, such appeal shall, on motion, be dismissed. After the filing of the record and proof of service aforesaid, the cause on appeal shall be proceeded with as the rules of the supreme court, or such special rules as said court may make in such cases, and their order from time to time thereunder may require. Said court shall have power to make any and all such rules concerning such appeals as may be necessary and expedient in furtherance of this act, as well as to preparation of the case for submission as to supplying deficiencies of record, if any, and for avoiding unnecessary costs and delay. [L. '81, p. 158, §32; G. S. '83, pp. 582, 583, §1794.

§ 710. (2433) Court May Dismiss Referee—Vacancy—New Appointment.

The district court, or judge thereof in vacation, in case of the death, resignation, illness, absence or other disability of the referee hereby provided for, or for any misconduct in him, or other good cause to such judge appearing, shall appoint such other properly qualified person in his stead as he shall deem proper, who shall proceed without delay to perform all the duties of his office, as herein pointed out, which shall remain unperformed by his predecessor in office. [L. '81, p. 159, §33; G. S. '83, p. 583, §1795.

§ 711. (2434) Suits Must be Brought in Four Years—Injunctions in What Cases—What Districts—Commissioner's Duty.

Nothing in this act or in any decree rendered under the provisions thereof, shall prevent any person, association or corporation from bringing and maintaining any suit or action whatsoever hitherto allowed in any court having jurisdiction, to determine any claim of priority of right to water, by appropriation thereof, for irrigation or other purposes, at any time within four years after the rendering of a final decree under this act in the water district in which such rights may be claimed, save that no writ

of injunction shall issue in any case restraining the use of water for irrigation in any water district wherein such final decree shall have been rendered, which shall effect [affect] the distribution or use of water in any manner adversely to the rights determined and established by and under such decree, but injunctions may issue to restrain the use of any water in such district not affected by such decree, and restrain violations of any right thereby established, and the water commissioner of every district where such decree shall have been rendered shall continue to distribute water according to the rights of priority determined by such decree, notwithstanding any suits concerning water rights in such district, until in any suit between parties the priorities between them may be otherwise determined, and such water commissioner have official notice by order of the court or judge determining such priorities, which notice shall be in such form and so given as the said judge shall order. [L. '81, p. 159, §34; G. S. '83, p. 583, §1796.

§ 712. (2435) After Four Years, Suit Barred.

After the lapse of four years from the time of rendering a final decree, in any water district, all parties whose interests are thereby affected shall be deemed and held to have acquiesced in the same, except in case of suits before then brought, and thereafter all persons shall be forever barred from setting up any claim to priority of rights to water for irrigation in such water district adverse or contrary to the effect of such decree. [L. '81, p. 160, §35; G. S. '83, pp. 583, 584, §1797.

§ 713. (2436) Compensation of Referee—How Paid—His Duty to Keep Account.

The referee appointed [as provided] in this act shall be paid the sum of six dollars per day while engaged in discharging his duties as herein provided, and also his reasonable and necessary expenses and mileage at the rate of ten cents for each mile actually and necessarily traveled by him in going and coming in the discharge of his duties as such referee which said *per diem* allowance, expenses and mileage shall be paid out of the treasury of the county in which such water district shall lie, if it be contained in one county, and if such water district shall extend into two or more counties, then in equal parts thereof, shall be paid out of the treasury of such county into which such district shall extend. He shall keep a just and true account of his services, expenses and mileage and present the same from time to time to the district court, or judge in vacation, verifying the same by oath, and the judge, if he find the same correct and just, shall certify his approval thereof thereon, and the same shall thereupon be allowed by the board of county commissioners of the county in which said water district shall lie, but if said [water district] extend into two or more counties, he shall receive from the clerk of the district court separate certificates, under seal of the court, showing the amount due him from each county, upon which certificate the board of county commissioners of the respective counties shall allow the same on presentation thereof. [L. '81, p. 160, §36; G. S. '83, p. 584, §1798.

§ 714. (2437) Repeal.

All laws and parts of laws heretofore in existence inconsistent with the provisions of this act, shall be, and the same are hereby repealed. [L. '81, p. 160, §37; G. S. '83, p. 584, §1799.

§ 715. (2438) Sheriff Not Serve Writ Outside His County.

Nothing herein contained shall be construed to authorize any sheriff to serve any writ outside of the limits of his own county, or give effect to any record by way of notice or otherwise, in any county other than that in which it belongs. [L. '79, p. 106, §31; G. S. '83, p. 584, §1800.

§ 716. (2439) Fees of District Clerk—How Audited—Paid.

The fees of the clerk of the district court for a service rendered under this act shall be paid by the counties interested in the same manner as the fees of the water commissioners, upon the said clerk rendering his account, certified by the district judge to the board or boards of county commissioners of the county or counties embracing the water district in case of which the services shall have been rendered. [L. '79, p. 108, §43; G. S. '83, p. 584, §1801.

DIVISION XII.—WATER DIVISIONS AND IRRIGATION DIVISION ENGINEERS.

§ 717. (2440) Irrigation Division Engineers—Irrigation Divisions.

The office of superintendent of irrigation is hereby declared abolished, and in place of such superintendents the governor shall, subject to confirmation by the senate, appoint five persons, who shall be known as irrigation division engineers, who shall be qualified to perform the duties devolving upon them, as hereinafter provided, one of the said officers to have jurisdiction over irrigation division No. 1, comprising all water districts now or hereafter to be formed, consisting of lands in the state of Colorado irrigated by water taken from the South Platte river, the North Platte river, the Big Laramie river, the North and Middle Forks of the Republican river, Sandy and Frenchman's creeks, and the streams draining into the said rivers and creeks; one over irrigation division No .2, comprising all water districts now or hereafter to be formed, consisting of lands irrigated by water taken from the Arkansas river, the South Fork of the Republican river, the Smoky Hill river and the Dry Cimarron river and the streams draining into the said rivers; one over irrigation division No. 3, comprising all water districts now or hereafter to be formed, consisting of lands watered from the Rio Grande river and its tributaries; one over irrigation division No. 4, which is hereby created, comprising all water districts now or hereafter to be formed, consisting of lands in the state of Colorado watered by the San Juan river and its tributaries; and, also, all water districts now or hereafter to be formed, consisting of lands in the state of Colorado watered by the Grand river and its tributaries, below the mouth of Roan creek, including water district No. 42, and one over irrigation division No. 5, which is hereby created,

comprising all water districts now or hereafter to be formed, consisting of lands in the state of Colorado watered by the Grand river and its tributaries above and including Roan creek and water districts Nos. 39 and 45, and also, all water districts now or hereafter to be formed, consisting of lands in the state of Colorado irrigated by water taken from the Green river and its tributaries, respectively. And such division engineer shall be appointed from the division over which he has jurisdiction and he shall have been a resident of the division for at least one year prior to appointment. [L. '03, pp. 281-2, §1.

§ 718. (2441-2446)

Repealed by implication by L. '03, p. 288, §15, same is now §2447*m*, *post*, §731.

§ 719. (2447*a*) **Application for Appointment as Division Engineer.**

Any person desiring the appointment of irrigation division engineer may file with the state engineer a request for an examination as to his qualifications, and the state engineer shall thereupon notify the applicant of the time and place where the next examination is to be held, at which place the applicant must present himself at the time specified, prepared to take such examination. [L. '03, pp. 282-283, §3.

§ 720. (2447*b*) **Qualifications of Applicants.**

Such examinations shall be for the purpose of determining the qualifications of applicants, and shall comprise:

First—Questions on the measurement of water, which shall include tests in the actual measurement of water in the field, on a basis of 30 per cent. of the total.

Second—Questions on the laws and customs relative to irrigation and water rights in Colorado, and including questions relating to the local conditions of the division for which the examination is being held, on a basis of 30 per cent. of the total.

Third—Questions on his experience and the extent of his practice in matters relating to the use of water in irrigation or for other beneficial purposes, on a basis of 40 per cent. of the total. [L. '03, p. 283, §4.

§ 721. (2447*c*) **Examination Papers—Rating.**

The state engineer shall examine and rate the examination papers of each applicant, and shall certify to the governor a list of names of all those receiving a rating of 70 per cent. or over, together with the markings of each, and from this list the governor shall, subject to confirmation by the senate, appoint persons to fill vacancies; Provided, That such list shall hold good for a period of two years from the date of its certification to the governor, but no longer; and, Provided, further, That nothing herein contained shall prevent any candidate from taking later examinations for the purpose of reinstatement or of improving his rating. [L. '03, p. 283, §5.

§ 722. (2447*d*) **Term—Removal.**

Any irrigation division engineer appointed as hereinbefore provided, shall be appointed for a term of two years, or until his

successor shall have been appointed and qualified, and shall be removed only for malfeasance in office, incompetency or neglect of duty. [L. '03, p. 283, §6.

§ 723. (2447e) Salaries—Vouchers—Expenses.

Each irrigation division engineer shall receive the sum of one hundred and twenty-five dollars ($125) per month, for the time actually employed in the discharge of his duties, payable monthly upon vouchers, approved by the state engineer, drawn upon the auditor of state, by whom a warrant shall be drawn upon the state treasurer therefor. He shall also receive reimbursements for all necessary expenses, evidenced by vouchers, incurred in the performance of his duties, which expenses shall not exceed the sum of five hundred dollars ($500) per annum, and such expenses shall be paid upon vouchers, approved by the state engineer, drawn upon the auditor of state, by whom a warrant shall be drawn on the state treasurer therefor. [L. '03, pp. 283-284, §7.

§ 724. (2447f) Oath of Office—Bond.

Before entering upon the duties of his office the irrigation division engineer shall subscribe to an oath before the judge of a court of record that he will faithfully perform the duties of his office, and shall file said oath with the secretary of state, together with his official bond in the penal sum of five thousand dollars ($5,000), said bond to be signed by sureties approved by the secretary of state, and conditioned upon the faithful discharge of the duties of his office and for delivery to his successor or to the state engineer, upon demand, all moneys, books, instruments and other property belonging to the state or to the irrigation divisions under his control. [L. '03, p. 284, §8.

§ 725. (2447g) Duties of Division Engineer—Water Commissioners—Hearing Testimony.

The duties of the irrigation division engineer shall be as follows: He shall be governed by all acts heretofore enacted relative to superintendents of irrigation and shall have general control over the water commissioners of the several districts within his division. He shall, under the general supervision of the state engineer, execute the laws of the state relative to the distribution of water, in accordance with the right of priority of appropriation, as established by judicial decrees.

He shall, in the distribution of water, be governed by the regulations of this act, and acts that are now in force, but for the better discharge of his duties, he shall have the authority to make such other regulations to secure the equal and fair distribution of water, in accordance with the rights of priority of appropriation, as may, in his judgment, be needed in his division; Provided, Such regulations shall not be in violation of any part of this act, or other laws of the state, but shall be merely supplementary to and necessary to enforce the provisions of the general laws and amendments thereto.

Any person, ditch company, or ditch owner, who may deem himself injured or discriminated against by any such order or regulation of such irrigation division engineer shall have the

right to appeal from the same to the state engineer, by filing with the state engineer a copy of the order or regulation complained of, and a statement of the manner in which the same injuriously affects the petitioner's interest. The state engineer shall, after due notice, hear whatever testimony may be brought forward by the petitioner, either orally or by way of affidavits, and through the irrigation division engineer shall have power to suspend, amend or confirm the order complained of.

He shall have the right to call out any water commissioner of any water district within his division, at any time he may deem it necessary, and he shall have the power to perform the regular duties of water commissioner in all districts within his division.

And such division engineer shall, further, make measurements of streams; shall measure and rate ditches; shall require the water commissioners under their jurisdiction to make annual reports, as hereinafter provided, on or before the 15th of November of each year; shall collect data concerning reservoirs and reservoir sites, power sites, flow of water in streams, and perform such other duties as the state engineer shall direct and as are of benefit to his division, or divisions, or to the state in general. [L. '03, pp. 284, 285, §9.

§ 726. (2447*h*) Charges Against Water Commissioner—Trial.

Charges made against any water commissioner for malfeasance in office, neglect of duty, or incompetency to fulfill the duties incumbent upon him, shall be made to the division engineer in writing, setting forth the specific charges against him, who shall hold a fair and impartial trial, after five days' notice to such water commissioner, upon whom a written copy of the charges shall be served. At such trial such water commissioner shall be permitted to appear in person and by counsel, and introduce evidence. Should such water commissioner be found guilty of any of the offenses charged, then, and in that case only, the irrigation division engineer having jurisdiction is hereby empowered to suspend him. All such investigations shall be tried and determined within five days from the date set for trial, and at which trial all oral testimony shall be reduced to writing; Provided, That either party may take depositions anywhere in the state and may have them read at said trial by giving the opposite party twenty-four hours' notice of the time and place and names of the parties whose depositions will thus be taken.

Upon such suspension the division engineer shall, within ten days, file all pleadings, papers and testimony with the state engineer for review; whereupon the state engineer shall appoint a competent deputy to at once assume control of the district of the water commissioner so suspended. The said deputy shall retain such control until the disability of the commissioner is removed or a new commissioner is appointed and qualified, and the said deputy shall be paid for his services from the state engineer's assistants' fund. The state engineer shall review the action of the division engineer as expeditiously as possible, and within thirty days from the time of receiving such papers, shall submit his findings to the governor for his action.

In case such suspension of any water commissioner be recommended to be made permanent by the state engineer in his find-

ings, the governor shall, upon the recommendation of the board or boards of county commissioners, as provided by law, forthwith appoint some suitable and competent person to fill such vacancy.

The person or corporation making any such charges against any water commissioner shall furnish a good and responsible bond in such reasonable sum as may be fixed by the division engineer, conditioned for the payment of the reasonably necessary expenses incurred by the water commissioner in case the charges preferred against him are not sustained by the division engineer.

All division engineers shall be under the control and supervision of the state engineer, and may have charges preferred against them in the same manner, and such charges may be heard and determined by the state engineer upon the same conditions herein provided for like proceedings against the water commissioner. [L. '03, pp. 285-287, §10.

§ 727. (2447*i*) Judicial Decrees—Certified Copies.

The clerk of any court issuing judicial decrees fixing the priorities of appropriation of water for irrigation or other beneficial purposes in any of such divisions shall furnish the irrigation division engineer having jurisdiction with certified copies thereof, as heretofore provided by law in the case of superintendents of irrigation, whereupon such engineer shall make a tabulated statement of such decrees, in a book prepared for that purpose, and shall forward a copy thereof to the state engineer and keep and preserve in his office the certified copy. [L. '03, p. 287, §11.

§ 728. (2447*j*) November Meeting—Reports.

There shall be held in the office of the state engineer in November of each year a meeting of the irrigation division engineers and of the state engineer and his chief assistant, at which meeting the reports of the irrigation division engineers shall be presented and a general discussion had of the matters which have transpired during the previous season, and at which a program of the work for the ensuing season shall be discussed and determined upon.

The reports filed with the state engineer shall include all correspondence for the season on all business and official acts for the season last past, and shall include the reports of the water commissioners, as hereinafter defined, and other data and information. [L. '03, p. 287, §12.

§ 729. (2447*k*) Water Commissioners' Reports—Contents.

It shall be the duty of each irrigation division engineer to prepare and tabulate the reports of the water commissioners in his division, which reports shall contain a statement of the actual carrying capacity and the amount of water actually carried by each ditch or canal in his district for each and every day when water was being so carried, the total number of acres lying under each ditch or canal and the number of acres actually irrigated therefrom. It shall also contain a statement of the kind of crops and the acreage under each decreed ditch or canal, the amount of water stored in each reservoir, the amount used therefrom, with the dates of such storage and use, and the same shall be on

blanks, or in books, prepared for that purpose and furnished by the state engineer. They shall contain a written statement of the official acts of the commissioners, and other matters of interest and use, and shall be duly subscribed and sworn to and filed with the irrigation division engineer on or before the 15th day of November of each year. [L. '03, pp. 287, 288, §13.

§ 730. (2447*l*) Superintendents of Irrigation Act Temporarily.

Pending the examination, appointment and qualification of the irrigation division engineers, the superintendents of irrigation holding office at the time of the passage of this act in the several divisions shall act and have the same authority as said irrigation division engineers, as hereinbefore provided. L. '03, p. 288, §14.

§ 731. (2447*m*) Repeal.

All acts and parts of acts inconsistent herewith are hereby repealed. [L. '03, p. 288, §15.

§ 732. (2448-2454)

Sections 2448-2452 and 2454 repealed by implication by L. '03, p. 288, §15, same §2747*m*. Section 2453 is at least amended if not repealed by implication by §§2447*h*-2447*m*. *Ante*, §§726-731.

§ 733. (2455-2457)

Amended if not repealed by implication by L. '03, pp. 287-288, §§11-15, same §§2447*h*-2447*m*. *Ante*, §§726-731.

DIVISION XIII.—STATE ENGINEER.

An Act providing for the appointment of a state engineer, defining his powers and duties, fixing his salary and the expenses of his office, and repealing sections 6, 7, 8, 9, 10, 11 and 12 of an act entitled, "An act to provide for the appointment of a state engineer, and to define his duties and regulate his pay, and for the appointment of his assistants, and the establishment of water divisions," approved March 5, 1881.—*Approved March* 30, 1889. *In force March* 30, 1889. L. '89, p. 371.

§ 734. (2458) Governor to Appoint a State Engineer—Office—Salary—Oath—Bond.

The governor shall appoint a state engineer, who shall hold his office for the term of two years, or until his successor shall be appointed and qualified. The governor may at any time, for cause shown, remove said state engineer. The said state engineer shall have his office at the state capitol, in suitable rooms to be provided for him by the secretary of state, who shall furnish him with suitable furniture, postage and such proper and necessary stationery, books and instruments as are required to best enable him to discharge the duties of his office. He shall be paid a salary of three thousand dollars per annum, payable monthly by the state treasurer, on warrants drawn by the state auditor. The said state engineer shall, before entering on the discharge of

his duties, take and subscribe to an oath, before the judge of a state court of record, to faithfully perform the duties of his office, and file said oath with the secretary of state, together with his official bond, in the penal sum of ten thousand dollars, said bond to be signed by sureties approved by the secretary of state and conditioned upon the faithful discharge of the duties of his office and for delivering to his successor, or other officer authorized by the governor to receive the same, all moneys, books, instruments and other property belonging to the state then in his possession or under his control, or with which he may be legally chargeable as such state engineer. [L. '89, p. 371, §1.

§ 735. (2459) Engineer Control Waters, Make Measurements, Collect Data.

The state engineer shall have general supervising control over the public waters of the state. He shall make or cause to be made careful measurements of the flow of the public streams of the state from which water is diverted for any purpose, and compute the discharge of the same. He shall also collect all necessary data and information regarding the location, size, cost and capacity of dams and reservoirs hereafter to be constructed, and like data regarding the feasibility and economical construction of reservoirs on eligible sites, of which he may obtain information, and the useful purposes to which the water from the same may be put. He shall also collect all data and information regarding the snow-fall in the mountains each season, for the purpose of predicting the probable flow of water in the streams of the state, and publish the same. [L. '89, p. 372, §2.

§ 736. (2460) Approve Designs and Plans for Dams and Embankments.

The state engineer shall approve the designs and plans for the construction and repair of all dams or reservoir embankments which are built within the state, which equal or exceed ten feet in vertical height. [L. '89, p. 372, §3.

§ 737. (2461) State Engineer to Have General Charge of Work—Require Reports.

The state engineer shall have general charge over the work of the division water superintendents and district water commissioners, and shall furnish them with all the data and information necessary for the proper and intelligent discharge of the duties of their offices, and shall require them to report to him at suitable times their official actions, and require of them annual statements, on blanks to be furnished by him, of the amount of water diverted from the public streams in their respective divisions and districts, and such other statistics as, in the judgment of [the] state engineer, will be of benefit to the state. [L. '89, p. 373, §4.

§ 738. (2462) Appoint a Deputy to Measure.

The state engineer shall, on request of any party interested and on payment of his *per diem* charges and reasonable expenses, appoint a deputy to measure, compute and ascertain all necessary

data of any canal, dam, reservoir or other construction, as required or as may be desired to establish court decrees, or for filing statements, in compliance with law, in the county clerk's records. [L. '89, p. 373, §5.

§ 739. (2463) Perform All Duties Imposed Upon Him—Expenses.

The state engineer shall, without any extra pay or compensation beyond the salary provided in section 1 of this act, perform all duties imposed upon him by law, and shall when called upon by the governor, give his counsel and services, without extra pay or compensation, to any state department or institution; Provided, however, That he shall be allowed all actual traveling and other necessary expenses, and the actual cost of preparing necessary maps and drawings, which actual expenses shall be paid by the department or institution requiring his services. [L. '89, p. 373, §6.

An Act to provide for fees in the office of the state engineer, and to provide for the disposition of such fees.—*Approved April 6, 1899. In force April 6, 1899.* L. '99, p. 348, ch. 138.

§ 740. (2463a) Collection of Fees.

Hereafter fees shall be collected by the state engineer as follows: For examination and filing of plats and statements of water rights, $1.00; for copies of records, per folio, 10 cents; for copies of plats, an amount sufficient to cover cost of making the same; for certificates,.....$1.00; for examination of plans and specifications for reservoirs, dams, embankments, or other structures, $1.00 for each $5,000 or fraction thereof of the estimated cost thereof. [L. '99, p. 348, §1.

§ 741. (2463b) Disposition of Fees.

The fees so collected shall be deposited with the state treasurer to the credit of the gauging fund, and shall be available for the salary and expenses of gauging streams and for making seepage measurements and shall be paid by warrants issued by the auditor of state upon vouchers approved by the state engineer. [L. '99, p. 349, §2.

§ 742. (2464) May Appoint Deputies and Revoke the Same—Bond—Oath.

The state engineer may appoint one or more deputies, as he may think proper, for whose official actions he shall be responsible, and may revoke such appointments at his pleasure; and he may also deputize any person to do a particular service; and the said state engineer and his sureties shall be responsible on his official bond for the default or misconduct of his deputies. Such appointment and revocation shall be in writing, under the signature and official seal of the state engineer, and shall be filed in the office of the secretary of state. All persons appointed shall take and subscribe to an oath, before the judge of a court of record, to truly perform the duties of the office to which he is appointed; and such oath shall be filed with his appointment in the office of the secretary of state. In addition to the deputies provided for in this section, the state engineer may employ such assistance in performing the work of his office as he may deem necessary. [L. '89, p. 373, §7.

§ 743. (2465) Pay of Deputies and Assistants.

The pay of the deputies and assistants of the state engineer shall not exceed the sum of six dollars per day for each day employed, together with actual expenses, and the whole amount which may be so expended is hereby limited to the sum of forty-five hundred dollars each year. [L. '89, p. 374, §8.

§ 744. (2466) Require Owners of Ditches to Construct and Maintain a Measuring Weir.

For the more accurate and convenient measurement of any water appropriated pursuant to any judgment or decree rendered by any court establishing the claims of priority of any ditch, canal or reservoir, the owners thereof may be required by the state engineer to construct and maintain, under the supervision of the state engineer, a measuring weir or other device for measuring the flow of the water at the head of such ditch, canal or reservoir, or as near thereto as practicable. The state engineer shall compute, and arrange in tabular form, the amount of water that will pass such weir or measuring device at the different stages thereof, and he shall furnish a copy of a statement thereof to any water superintendents or commissioners having control of such ditch, canal or reservoir. [L. '89, p. 374, §9.

§ 745. (2467) Unit of Measurement.

The state engineer shall use in all his calculations, measurements, records and reports, the cubic foot per second as the unit of measurement of flowing water, and the cubic foot as the unit of measurement of volume. [L. '89, p. 374, §10.

§ 746. (2468) Engineer Prepare True Report.

The state engineer shall prepare and render to the governor a full and true report of his work, regarding all matters and duties devolving upon him by virtue of his office, which report shall be delivered at the time when the reports of other state officers are required by law to be made, in order that it may be laid before the general assembly at each regular session thereof. [L. '89, p. 375, §11.

§ 747. (2469) Repeal.

Sections 6, 7, 8, 9, 10, 11 and 12 of an act entitled, "An act to provide for the appointment of a state engineer, and to define his duties and regulate his pay, and for the appointment of his assistants and the establishment of water divisions," approved March 5, 1881, the same being general sections 1807, 1808, 1809, 1810, 1811, 1812 and 1813 of the general statutes of the state of Colorado, are hereby repealed. [L. '89, p. 375, §12.

An Act to provide for the collection of fees in the office of the state engineer, for depositing such fees with the state treasurer, the creation of a guaging [gauging] fund, the uses to which such fund may be put, and the repeal of all acts in conflict herewith. —*Approved April* 10, 1903. *In force April* 10, 1903. L. '03, p. 294, ch. 128.

§ 748. (2469a) Fees Collected by State Engineer.

Fees shall be collected by the state engineer for work done in his office as follows:

For the examination, filing and certification to the duplicate of each map and statement describing a claim to a water right and of each judicial decree ordering the transfer of a water right, $1.00.

For each certificate other than that made in the case of original filings requiring official signature and seal, $1.00.

For the examination and filing of each set of plans and specifications for reservoirs, dams, embankments, and other structures for the purpose of utilizing or storing water, $1.00 for each $5,000.00 or fraction thereof of the estimated cost of such structure or structures.

For copies of plats, the sum of $1.00 for each hour or fraction thereof necessary for the making of the same.

For copies of records, 10 cents per folio. [L. '03, p. 294, §1.

§ 749. (2469b) Sums Deposited with Treasurer—Gauging Fund.

At the end of each month the sum of the fees collected during the month, as provided for in section 1 of this act, shall be deposited with the state treasurer, with a complete statement showing the amounts thus received and the sources from which they are derived, and the said amounts shall be credited by the said treasurer to a fund which shall be known as a gauging fund. [L. '03, p. 295, §2.

§ 750. (2469c) How Gauging Fund Applied.

The amount credited to the gauging fund created as hereinbefore provided shall be available for the payment of expenses and salaries required for work of gauging streams, rating ditches, making seepage measurements, or other work connected with the proper distribution of water or ascertaining desired information concerning the flow of water. Warrants for the payments of such salaries and expenses shall be issued by the auditor of state upon presentation of vouchers regularly drawn and approved by the state engineer. [L. '03, p. 295, §3.

§ 751. (2469d) Repeal.

All acts and parts of acts in conflict herewith are hereby repealed. [L. '03, p. 295, §4.

DIVISION XIV.—STATE CONTROL.

§ 751a. (2470) Coal Creek Reservoir—Appropriation—Proviso.

There is hereby appropriated out of any money in the state treasury belonging to the internal improvement permanent fund, and any money which may hereafter be credited to said fund and not otherwise appropriated, the sum of twenty thousand (20,000) dollars, or as much thereof as may be necessary, as is hereinafter provided, for the construction of a reservoir at Coal creek, upon or adjacent to sections 20, 28 or 34, township 4 south, range 65

west, in the county of Arapahoe, to store the water of floods for the purpose of irrigation and other beneficial uses; Provided, That no part of said appropriation shall be used for the purchase of land, and that the said reservoir shall not be constructed except upon lands the title to which shall first be re-vested in the state; And Provided further, That all citizens of the state shall have free and equal rights to the use and benefits of said reservoir when constructed, subject only to such reasonable rules and restrictions as may be provided by law for the protection of the property. [L. '89, p. 215, §1; §§2471-2474 being §§2-5 of this act provide procedure for the construction of this reservoir.

§ 752. (2475) Water-works Property of State—Engineer Provide for Delivery of Water.

That the said reservoir and water-works, and the waters when so collected and stored, shall be the property of the state; and the water so supplied shall be turned into Coal creek or canal, for the purpose of supplying water for appropriations heretofore made, or hereafter to be made, in the order of such appropriation, by the several canals and reservoirs taken from said stream. The state engineer, or in his stead such person or persons as may be duly appointed for that purpose according to law, shall determine, regulate and provide for the delivery of such water to such ditches, canals and reservoirs, according to their several appropriations, decrees of court, capacities and necessities. [L. '89, p. 217, §6.

§ 753. (2476) Shall Not Impair Acquired Rights.

Nothing in this Act shall be construed so as to impair any rights acquired, or that may be acquired, under or by virtue of the irrigation laws of the state of Colorado. [L. '89, p. 217, §7.

§ 754. (2477) Damaging Reservoir a Misdemaneor—Penalty.

Any person interfering with or damaging said reservoir or any of its approaches or appurtenances, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined not exceeding one thousand (1,000) dollars, or by imprisonment in the county jail not exceeding one year. [L. '89, p. 217, §8.

§ 755. (2478) Appropriation for Preliminary Survey of the Grand, Laramie and North Platte.

That there is hereby appropriated out of any funds in the state treasury belonging to the internal improvement fund not otherwise appropriated the sum of three thousand dollars, or so much thereof as is necessary to defray the necessary expenses of a preliminary survey and investigation of the sources of the Grand, Laramie and North Platte river systems, with reference to turning the unappropriated waters thereof eastward, and causing them to flow into and through the tributaries of the South Platte and Arkansas river systems for the purpose of irrigation and other beneficial uses. [L. '89, p. 208, §1; §§2479-2480 being §§2-3 of this act provide for construction, engineers, reports, plans and contracts.

§ 756. (2481) Waters and Works Property of State—How Water Applied.

That the said ditches, canals and water-works, and the waters when so diverted, shall be the property of the state, and the waters so supplied shall be turned into the said South Platte and Arkansas rivers and their tributaries for the purpose of supplying deficiencies of water for appropriations heretofore made or hereafter to be made in the order of such appropriation by the several canals and reservoirs taken from said streams. The state engineer, or in his stead such person or persons as may be duly appointed for that purpose according to law, shall determine, regulate and provide for the delivery of such waters to such ditches, canals and reservoirs, according to their several appropriations decrees of court, capacities and necessities. [L. '89, p. 210, §4; §2482 being §5 of the act carries an appropriation of $10,000.00.

§ 757. (2483) Penitentiary Commissioners May Use Convict Labor to Construct Ditches.

That, for the purpose of reclaiming, by irrigation, state and other lands, and for the purpose of furnishing work for the convicts confined in the state penitentiary, the board of commissioners of the state penitentiary is hereby authorized to locate, acquire and construct, in the name of and for the use of the state of Colorado, ditches, canals, reservoirs and feeders, for irrigating and domestic purposes, and for that purpose may use convict labor of persons confined, or that may be confined, as convicts in the state penitentiary at Canon City. [L. '89, p. 285, §1.

§ 758. (2484) State Engineer Survey Ditches from Arkansas River.

The state engineer, under the direction of the board, shall survey, lay out and locate a ditch or canal upon the most feasible route on either side of the Arkansas river, which said ditch or canal shall be of sufficient capacity to cover at least thirty thousand acres of good arable land between Canon City and Pueblo; Provided, That work shall only be commenced and performed upon one main ditch, canal, reservoir or feeder at a time; that a second shall not be commenced until the completion of the first. [L. '89, p. 285, §2.

§ 759. (2485) Board Given All Rights and Powers.

The said board is hereby given all the rights and powers that an individual or corporation now has, or may hereafter have, under the laws of the state, or of the United States, to acquire the right of way over, upon and to any lands necessary for it to use or occupy in the construction and maintenance of said ditches, canals, reservoirs or feeders. [L. '89, p. 286, §3.

§ 760. (2486) Title Shall Vest in State.

That the title to all ditches, canals, reservoirs or feeders, so constructed under this act, shall vest and remain in the state of Colorado, and the proceeds thereof shall be paid into the state treasury. [L. '89, p. 286, §4.

§ 761. (2487) Contract for and Lease Water Rights.

That when any part of any ditch, canal, reservoir or feeder shall be constructed under this act, said board of penitentiary commissioners may contract for and may lease water rights, upon such terms and under such rules and regulations as may be adopted by said board and approved by the governor of the state, to such individuals or corporations as may desire to lease the same. [L. '89, p. 286, §5; §§2488-2489, being §§6-7 of this act, provide for subscriptions from persons owning land along the canal system, issuance of certificates therefor and carry an appropriation of $10,000.00 for materials.

§ 762. Sections 2489*a*-2489*c*, L. '91, p. 335, §§1-3, carry an appropriation of $50,000.00 for continuing work on state canal No. 1 and provide for its use. Sections 2489*d*-2489*f*, L. '93, p. 57 §§1-3, appropriate $40,000.00 for the same purpose, and provide for its use. Sections 2489*g*-2489*i*, L. '94, p. 87, §§1-3, appropriate $10,000.00 for the same purpose and provide for its use.

§ 763. (2490*a*) Board of Control of State Canal No. 1.

There is hereby created a board to be known as "the board of control of state canal number one and reservoirs connected therewith." The said board shall be composed of the lieutenant governor, who shall be chairman, the state engineer and the warden of the penitentiary. The secretary of the state board of land commissioners shall be secretary of said board of control. Said board is hereby charged with the duty of securing the early completion of state canal number one, and reservoirs connected therewith and of the operation and maintenance of the same as herein provided. [L. '93, pp. 441-442, §1.

§ 764. (2490*b*) Plans of State Canal No. 1—Line—Survey.

It shall be the duty of the state engineer to prepare plans and specifications upon and according to the survey already established by the state engineer, and now on file in his office, pertaining to the construction and completion of state canal number one and reservoirs connected therewith. From a point where line of said canal crosses east line of township 18, east of and below the present constructed part of the same east of the "prison hogback," near Canon City, south of range seventy (70) west, eastward to the end of said canal as now projected and surveyed; and pertinent to the construction of all appurtenances necessary to the successful operation of said canal, except lateral ditches therefrom, and the head-gates for such lateral ditches. It shall also be the duty of the state engineer to make any survey which may be necessary to the thorough preparation of such plans and specifications, and to submit such plans and specifications as soon as may be, to the board of control of state canal number one and reservoirs connected therewith, created and constituted as herein provided. [L. '93, p. 442, §2.

§ 765. (2490*c*) Plans Approved—Advertise for Bids—Sale of School Lands.

Upon the completion and submission of the plans, and specifications, as hereinbefore provided, it shall be the duty of such

board of control to carefully review and consider the same, and after making changes and modifications therein, if such should seem advisable, to approve such plans and specifications. Thereupon it shall be the duty of the secretary of said board of control to advertise, for at least thirty consecutive days, for bids for the completion of said canal in accordance with such plans and specifications; such advertisements to be made in three or more papers, one or more of which shall be published in the city of Denver, one in the county of Fremont and one in the city of Pueblo. The state board of land commissioners, in order to facilitate the construction of said canal and reservoirs, may in conjunction with the board of control, advertise and offer for sale at not less than minimum price, every alternate quarter section of the state and school lands lying under the said canal. [L. '93, pp. 442-443, §3.

§ 766. (2490d) Contract—Lowest Bidder.

The board of control may enter into a contract as herein set forth; Provided, however, That such contract, if awarded, shall be awarded to the lowest responsible bidder; and Provided, also, That the said board may, at its discretion reject any and all bids, in which event they shall direct the secretary of said board to re-advertise for bids for the performance of such work. [L. '93, p. 443, §4.

§ 767. (2490e) Attorney General Prepare Contract—Bond.

The contract for the completion of state canal number one and reservoirs connected therewith shall be prepared by the attorney general, and shall provide among other things, for the completion of such canal in accordance with the plans and specifications, approved by the said board of control, within a period of eighteen (18) months from the date of such contract; and shall provide for the payment of such work in accordance with the provisions concerning payments hereinafter made in this act. The attorney general shall also prepare a bond in the penal sum of one hundred thousand dollars ($100,000) for the faithful performance of the work of completing said canal in accordance with said contract; which bond must be signed by at least ten good and sufficient sureties satisfactory to a majority of said board of control. [L. '93, p. 443, §5.

§ 768. (2490f) Payment by Certificates of Indebtedness.

Payment to the contractors for the material and labor furnished and performed in the construction and completion of said canal shall be made by means of certificates of indebtedness, upon the completion of each five (5) miles of said canal, in sums not to exceed ninety per cent. of the state engineer's estimated cost therefor; and upon completion and acceptance by the board of control of the whole line of said canal, the whole amount of the contract price shall be so paid in certificates as herein provided. [L. '93, p. 443, §6.

§ 769. (2490g) Certificates of Indebtedness — Auditor Issue — Length of Time to Run—Accepted by State.

Upon the presentation to the auditor of the written acceptance of such work by the engineer, approved as herein provided, it

shall be the duty of the auditor to issue in favor of the contractor performing the work, or those duly authorized by him to receive the same, certificates of indebtedness, which certificates of indebtedness shall show upon their face that they bear five per cent. interest per annum, payable semi-annually from the date of their issuance until paid; that they are issued in lieu of immediate money compensation for materials and labor furnished and performed in constructing the state canal number one and reservoirs connected therewith, and such other things and material as, to the auditor, may seem pertinent and useful. The certificates of indebtedness so issued, shall be for one thousand dollars ($1,000) each, numbered consecutively. One-fourth of the entire amount shall be due five year from the date thereof; one-fourth shall be due and payable ten years from the date thereof; one-fourth shall be due and payable fifteen years from the date thereof; and one-fourth shall be due and payable twenty years from the date thereof. Such certificates of indebtedness shall be countersigned by the treasurer and approved by the governor. These certificates may be accepted by the state in payment for the carriage of water or in payment for lands, and the same shall not in any event become a claim against the state except as to said funds so to be received. [L. '93, p. 444, §7.

§ 770. (2490*h*) This section is same as §2490*j*, *post*, §790.

§ 771. (2490*i*) **Application of Water.**

It shall be the duty of the state board of land commissioners, to cause the waters carried in the state canal No. 1 and reservoirs connected therewith to be applied to the irrigation of the state lands and all other lands lying under said canal at the earliest, convenient and practicable times, and as a means among others, to effect such use of water, the board of land commissioners are authorized to, one-fourth shall be due and payable fifteen years from the date thereof; and one-fourth shall be due and payable twenty years from the date thereof. Such certificates of indebtedness shall be countersigned by the treasurer and approved by the governor. And the same shall not in any event become a claim against the state except as to said funds so to be received. [L. '93, p. 445, §9. [To make sense, after the words "authorized to" and before "one-fourth" the last four lines beginning with 'offer" in section 2490*k*, *post*, §773, should be inserted.]

§ 772. (2490*j*) **Board of Land Commissioners Assume Control When Completed.**

Upon completion of said canal and its acceptance and approval, as hereinbefore provided, the said board of control of state canal number one and reservoirs connected therewith, shall turn over the said canal, together with all drawings, specifications, reports and records pertaining to said canal and the action of said board of control, to the state board of land commissioners; whereupon the state board of land commissioners shall assume control of said canal and shall thereafter control, operate and maintain the same subject to such provisions of law as may hereafter be made and established. [L. '93, p. 445, §8.

§ 773. (2490*k*) Application of Water.

It shall be the duty of the state board of land commissioners to cause the waters carried in the state canal No. 1 and reservoirs connected therewith to be applied to the irrigation of the state lands and all other lands lying under said canal at the earliest convenient and practicable times, and as a means among others to effect such use of water, the board of land commissioners are authorized to offer numerous portions of said lands for lease at such reasonable prices, and for such periods, not exceeding twenty years, as will be conducive to the rapid settlement of such lands and the early use of such waters. [L. '93, p. 445, §9.

§ 774. (2490*l*) Rights and Powers of Board of Control.

The said board of control of state canal No. 1 and reservoirs connected therewith is here given all the rights and powers that an individual or corporation now has, or may hereafter have, under the laws of the state, or of the United States, to acquire the right of way over, upon and to any lands necessary for it to use or occupy in the construction and maintenance of such canal. [L. '93, pp. 445-446, §10.

§ 775. (2490*m*) Annual Charges for Carriage of Water—Sell Rights.

It shall be the duty of the state board of land commissioners to establish from time to time reasonable annual charges for the carriage of waters or sell perpetual rights of water if deemed by it more expedient. [L. '93, p. 446, §11.

§ 776. (2490*n*) State Own Canal.

The title to the said canal shall vest and remain with the state of Colorado, and any money received for the carriage of water therein shall be devoted to the maintenance and operation of such canal, and surplus over and above the cost of operation, and maintaining such canal, shall be converted into the state treasury and applied by the state treasurer to meeting the certificates of indebtedness herein provided for and interest thereon. [L. '93, p. 446, §12.

§ 777. (2490*o*) Lateral Ditches be Constructed.

It shall be the duty of the said board of land commissioners to construct from time to time and as rapdily as may seem to such board advisable, lateral ditches and the necessary appurtenances thereto, for supplying the lands of the state lying under said canal with water for irrigation, and to see that all of such lands belonging to the state are brought under cultivation within a reasonable time. [L. '93, p. 446, §13.

§ 778. (2490*p*) Certificates Received for Charges for Carriage.

Any receipts of certificates heretofore issued in return for subscriptions and advancement of money by persons owning lang [land] along the line of state canal No. 1, and reservoirs connected therewith shall be received in lieu of money for the lawful and reasonable charges for the carriage of water in the said canal, and

all of the certificates hereafter issued as herein provided shall be received in lieu of money for charges for the carriage of water in said canal or for perpetual water rights thereunder. [L. '93, p. 446, §14.

§ 779. (2490q) Traveling Expenses of Board of Control.

The members of the state board of control of state canal No. 1, and reservoirs connected therewith shall be entitled to their reasonable traveling expenses while performing the duties herein laid upon them for which amounts the auditor shall draw warrants upon the state treasurer, when such amounts shall be duly certified to him by the secretary of the said board of control. [L. '93, pp. 446-447, §15.

§ 780. (2490r) Repeal.

All acts and parts of acts inconsistent with the provisions of this act are hereby repealed. [L. '93, p. 447, §16.

§ 781. (2491) Appropriation for South Boulder Canal—Purpose.

There is hereby appropriated out of the fund for internal improvement the sum of twenty-five thousand (25,000) dollars, or so much thereof as may be necessary, for the purpose of making a survey and for the construction of a canal along the western slope of the range for a distance of twenty miles, more or less, and to cut across the range and connect with the South Boulder creek for the purpose of increasing the supply of water in said South Boulder creek for agricultural purposes. [L. '89, p. 46, §1; §§2492-2495, being §§2-5, of this act provide for a board of construction, the selling of warrants to provide funds, and that the survey shall be in water district No. 6.

§ 782. (2405a) State Engineer Lay Out Ditch in Grand Valley—Headgate.

The state engineer under the direction of the board of penitentiary commissioners shall lay out survey and locate a ditch or canal and laterals, reservoirs and feeders as may be necessary or expedient so as to cover all the land practicable in the Grand valley in Mesa county. The headgate of the said ditch or canal shall be located in the Hogback canon, and the water for said canal shall be taken out of the Grand river. [L. '91, pp. 335-336, §1.

§ 783. (2495b) Mesa County State Ditch.

The said ditch shall be known as the Mesa county state ditch, and during the construction of the same and when constructed shall be the property of the state of Colorado and all revenues derived therefrom shall be turned into the state treasury. [L. '91, p. 336, §2.

§ 784. (2405c) Penitentiary Commissioners Issue Certificates.

It shall be the duty of the board of penitentiary commissioners after said ditch is surveyed to issue and sell for cash certificates bearing seven per cent. interest from the date of the issuance thereof the principal and interest of which shall be receivable by the state of Colorado as cash for water to be taken out of said canal under such rules and regulations as may be adopted by said board and state engineer and the governor of the state. [L. '91, p. 336, §3.

§ 785. (2495*d*) Construction of Ditch.

That after the subscription of fifty thousand dollars for said certificates has been received by said board and twenty per cent. of the same has been paid in, it shall be the duty of said board to commence the construction of said ditch, and in order to construct the same the said board of penitentiary commissioners shall have the power and authority and it shall be their duty to select from the able-bodied convicts confined in the state penitentiary "as many as are not otherwise employed" none of whom shall be under life sentence, and transport the said convicts to a general headquarters for the construction of said ditch where said board shall make suitable provisions for the safe keeping of said convicts and said convicts shall be used under proper guard for the construction of said ditch. [L. '91, p. 336, §4.

§ 786. (2495*e*) Right of Way.

The said board shall have the right and power to purchase, condemn or otherwise lawfully acquire a right of way for the said canal as provided in other cases and for said purpose may sue in the name of the people of the state of Colorado. [L. '91, p. 336, §5.

§ 787. (2495*f*) Cash Subscriptions—How Used.

Said board shall have the power to use all cash subscriptions for the purpose of purchasing provisions, tools, teams, etc., for the construction of said ditch or may receive at cash valuation groceries, vegetables, teams, tools, labor and other things necessary in constructing said ditch, on subscription for certificates as provided in section three of this act. [L. '91, p. 336, §6.

§ 788. (2495*g*) Convicts Returned to Penitentiary.

Five days before the expiration of the term of confinement of any convict or convicts employed in the construction of said ditch shall expire, he or they shall be transported to the penitentiary at Canon City and others shall be taken to said work in his or their places. [L. '91, p. 336, §7.

§ 789. (2495*h*) Transportation.

Said board of penitentiary commissioners shall have the power and authority to obtain or make a contract with any railroad company for rates for transporting prisoners to and from said work; or for transporting material, goods, wares or merchandise to be used in the construction of said ditch; and in advertising for bids for general penitentiary provisions and supplies, as now provided by law, may stipulate that such proportion of said provisions and supplies as may be necessary for the sustenance of convicts employed in the construction of said Mesa county, state ditch shall be delivered at the general headquarters of said ditch. [L. '91, p. 337, §8.

§ 790. (2495*i*) Commissioner Take Charge of Construction—Compensation.

Said board may select one of their number who shall have immediate charge of the construction of said ditch and shall give his personal attention to the same and when so selected the said

member of said board shall receive in addition to the present compensation two thousand five hundred dollars ($2500), per year, payable out of the funds derived from the sale of certificates as provided in section three of this act. [L. '91, p. 337, §9.

§ 791. (2495*j*) Deputy Warden be Appointed.

The warden of said penitentiary may appoint a deputy warden who shall have the same power and authority as he now possesses who shall be placed in charge of the convicts employed in the construction of said canal. [L. '91, p. 337, §10.

§ 792. (2495*k*) Superintendent of Ditch When Completed—Salary.

After said canal is fully completed said convicts shall be returned to the penitentiary at Canon City and the governor shall appoint with the advice and consent of the senate a competent person who shall manage and superintend said ditch for and on behalf of the state and who shall receive fifteen hundred dollars per year salary to be paid out of the income from said ditch upon the order of board of penitentiary commissioners. [L. '91, p. 337, §11.

§ 793. (2495*l*) Contracts of Carriage—Lease Water Rights.

When said ditch or any of its reservoirs or feeders shall be constructed under this act said board of penitentiary commissioners may contract for the carriage and delivery of water, and may lease water rights upon such terms and under such rules and regulations as may be adopted by said board and approved by the governor of the state to such individuals or corporations as may desire to lease the same. [L. '91, p. 337, §12.

§ 794. (2495*m*) Repeal.

All acts and parts of acts inconsistent with the provisions of this act are hereby repealed. [L. '91, p. 338, §13.

§ 795. Las Animas County Reservoir.

Sections 2495*n*-2495*v*, L. 91, pp. 345-46, §§1-9, appropriate $15.000.00 for a reservoir in Las Animas county, and provide for a board of construction, that the reservoir shall be the property of the state, the procedure for construction, the sale or lease of the waters, and the disposition of the money received therefor.

§ 796. (2495*w*) Reservoir in Chaffee County—Appropriation.

There is hereby appropriated out of any money in the state treasury belonging to the internal improvement income fund, and any money which may hereafter be credited to said fund, and not otherwise appropriated, the sum of fifteen thousand dollars, or so much thereof as may be necessary for the construction of one or more reservoirs, to be used for the conservation, storage and distribution of flood waters (and waters flowing in said creeks) and for the purpose of supplying the deficiency existing at certain seasons of the year, in the supply of water flowing in the Cottonwood creek, Chalk creek, and the South Arkansas river, in Chaffee county, Colorado, for the irrigation of lands which are or hereafter can be irrigated by waters taken from said creeks; *Provided*, That

no part of said appropriation shall be used for the purchase of land. [L. '91, p. 347, §1; §§2495x-2495b1, being §§2-6 of this act provide the procedure for the construction work, under a board of construction.

§ 797. (2495c1) State Own Reservoir—Control—Proceeds from Sale of Water Turned into State Treasury.

he said reservoir or reservoirs, when so constructed, and the waters therein, when so collected and stored, shall be the property of the state, and all lands on which shall be constructed said reservoir or reservoirs or the works connected therewith, shall first be vested in the state of Colorado, and until otherwise provided by law shall be under the charge, management and control of the said board of construction, and the said waters shall, under such rules and regulations as the board may prescribe, and shall be sold or leased by said board as said board may deem best, and all moneys received from the sale or lease of said water, whether the same shall be sold along with lands belonging to the state, or otherwise, shall be turned into the state treasurer, and by him credited to the internal improvement income fund. [L. '91, p. 349, §7.

§ 798. (2495c1½) County Commissioners Have Charge and Control of Boss Lake Reservoir.

The board of county commissioners of Chaffee county shall have charge and control of that certain state reservoir situated in said county and commonly known as the Boss Lake reservoir and shall without expense to the state of Colorado, maintain and keep said reservoir in good condition and provide for the storage of water as contemplated in the act providing for the construction of said reservoir and also for the distribution of said water under the direction of the water commissioner for the district in which said reservoir is situated, at such times as the scarcity of water in the stream known as the South Arkansas demands that the waters in said stream should be replenished for the purpose of irrigating the lands under ditches now, or hereafter to be constructed; *Provided*, That said waters shall be distributed by the said water commissioner *pro rata* without reference to the dates of priorities of water rights and without expense to the consumers thereof; *Provided, further*, That the county of Chaffee assumes and shall be held responsible for any damages resulting from breakage of the dam or water discharges therefrom. [L. '97, pp. 119-120, §1.

§ 799. (2495d1) Acquired Rights Not Impaired.

Nothing in this act shall be construed so as to impair any rights acquired, or that may be acquired, under or by virtue of the laws of Colorado. [L. '91, p. 349, §8.

§ 800. (2495e1) Damage to Reservoir—Punishment.

Any person wilfully damaging any reservoir constructed under the provisions of this act, or any of its approaches or appurtenances, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding one thousand dollars, or by imprisonment in the county jail for a term not exceeding one year, or by both such fine and imprisonment. [L. '91, p. 349, §9.

§ 801. (2495*f*1) Reservoir on Hardscrabble Creek—Appropriation.

There is hereby appropriated out of any money in the state treasury belonging to the internal improvement permanent fund, and any money which may hereafter be credited to said fund and not otherwise appropriated the sum of ten thousand dollars ($10,000) or as much thereof, as may be necessary, as hereinafter provided for the construction of a reservoir, or reservoirs, at the most convenient and suitable place, or places to be selected by the state engineer in township 21, range 69 west, in the county of Custer, to store the waters of the Hardscrabble creek, and its tributaries for the purpose of irrigation, and other beneficial uses. [L. '91, p. 350, §1; §§2495*g*1-2495*j*1, being §2-5, of this act provide the procedure for the construction of this reservoir.

§ 802. (2495*k*1) Property of State—State Engineer Regulate Delivery of Water.

That the said reservoir, or reservoirs, and water-works and the waters when so collected, and stored shall be the property of the state, and the water so supplied shall be turned into Hardscrabble creek or canals for the purpose of supplying water for appropriations heretofore made or hereafter to be made in the order of such appropriation by the several canals and reservoirs taken from said stream. The state engineer, or in his stead such person or persons as may be duly appointed for that purpose according to law, shall determine, regulate and provide for the delivery of such water to such ditches, canals, and reservoirs according to their several appropriations, decrees of court, capacities and necessities. [L. '91, p. 351, §6.

§ 803. (2495*l*1) Not Impair Acquired Rights.

Nothing in this act shall be construed so as to impair any rights acquired, or that may be acquired under or by virtue of the irrigation laws of the state of Colorado. [L. '91, p. 351, §7.

§ 804. (2495*m*1) Expense of Maintaining.

When said reservoir or reservoirs, are completed, together with the approaches the expense of maintaining and keeping them in repair shall be by the persons using, and having a direct benefit from the use of the water therefrom, and persons to whom a greater supply of water is received by the storage of water in the aforesaid reservoir of reservoirs. [L. '91, p. 351, §8.

§ 805. (2495*n*1) Damaging Reservoir—Penalty.

Any person interfering with or damaging said reservoir or reservoirs, or parts, or appurtenances therof shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not exceeding one thousand dollars ($1,000) or by imprisonment in the county jail not exceeding one year. [L. '91, p. 351, §9.

§ 806. (2495*o*1) Reservoir at Monument Creek—Appropriation.

There is hereby appropriated out of any money in the state treasury belonging to the internal improvement permanent fund, and any money which may hereafter be credited to said fund and not otherwise appropriated, the sum of thirty thousand (30,000)

dollars, or as much thereof as may be necessary, as is hereinafter provided, for the construction of a reservoir at Monument creek; upon or adjacent to sections fifteen and twenty-two, township eleven, range sixty-seven west, in the county of El Paso, to store the water of floods for the purpose of irrigation and other beneficial uses; *Provided*, That no part of said appropriation shall be used for the purchase of land, and that the said reservoir shall not be constructed except upon lands the title to which shall first be vested in the state; and, *Provided, further*, That all citizens of the state shall have equal rights to the use and benefits of said reservoir when constructed, subject only to such reasonable rules and restrictions as may be provided by law. [L. '91, p. 352, §1; §§2495*o*1-2495*s*1 being §§2-5 of this act provide the procedure for the construction of this reservoir.

§ 807. (2495*t*1) Property of State—Proceeds from Sale of Water Turned Into State Treasury.

That the said reservoir and the waters when so collected and stored, shall be the property of the state; and the water so supplied shall be disposed of by sale to those desiring the same, the rates per cubic foot per second of time therefor to be fixed by the said board, the payments thereof to be made to said board payable annually in advance on or before May 1st, of each year. The income derived from the sale of such water to be paid into the state treasury and placed to the credit of the internal improvement permanent fund. [L. '91, p. 353, §6.

§ 808. (2495*u*1) Acquired Rights Not Impaired.

Nothing in this act shall be construed so as to impair any rights acquired, or that may be acquired, under the virtue of the irrigation laws of the state of Colorado. [L. '91, pp. 353-354, §7.

§ 809. (2495*v*1) Damaging Reservoir—Penalty.

Any person interfering with or damaging said reservoir or any of its approaches or appurtenances, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be fined not exceeding one thousand (1,000) dollars or by imprisonment in the county jail not exceeding one year. [L. '91, p. 354, §8.

§ 810. (2495*w*1) Reservoir on Monument Creek—Appropriation.

There is hereby appropriated out of any money in the state treasury belonging to the internal improvement fund, and any money which may hereafter be credited to said fund, and not otherwise appropriated, the sum of four thousand dollars ($4,000), or so much thereof as may be necessary, for the purchase of lands for the state reservoir at Monument creek, in El Paso county, and for riprapping or paving the spillway to said reservoir. [L. '93, p. 447, §1; §§2495*x*1-2495*z*1 being §§2-4 of this act provide the procedure for the construction of this reservoir.

§ 811. (2495*a*2) Reservoir in Saguache County—Appropriation.

There is hereby appropriated out of any money in the state treasury belonging to the internal improvement income fund, and any money which may hereafter be credited to said fund, and not

otherwise appropriated, the sum of thirty thousand dollars or so much thereof as may be necessary, for the construction of one or more reservoirs, as is hereinafter provided, on or near the headwaters of Saguache creek, in Saguache county, Colorado, at some suitable point or points within or near township forty-three (43) north of range two (2) east N. M. P. M., or township forty-three (43) north of range three (3) east N. M. P. M. or both to be used for the conservative, storage and distribution of flood waters and waters flowing in said creek for the irrigation of lands which are or hereafter can be irrigated by water taken from said Saguache creek; *Provided*, That no part of said appropriation shall be used for the purchase of land. [L. '91, p. 354, §1; §§2495*2b*-2495*e*2 being §§2-5 of this act provide the procedure for the construction of this reservoir.

§ 812. (2495*f*2) Property of State—Proceeds Turned into State Treasury.

The said reservoir or reservoirs when so constructed, and the waters therein when so collected and stored shall be the property of the state, and until otherwise provided by law shall be under the charge, management and control of the said board of construction and the said waters, shall under such rules and regulations as the board may prescribe, be sold or leased, and all moneys received from such sale or lease, whether the same be sold along with state or school land or otherwise, shall be turned in to the state treasurer and by him credited to the internal improvement income fund. [L. '91, p. 356, §6.

§ 813. (2495*g*2) Acquired Rights Not Impaired.

Nothing in this act shall be construed so as to impair any rights acquired or that may be acquired under or by virtue of the laws of Colorado. [L. '91, p. 356, §7.

§ 814. (2495*h*2) Damaging Reservoir—Penalty.

Any person wilfully damaging any reservoir constructed under the provisions of this act, or any of its approaches or appurtenances shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding one thousand dollars or by imprisonment in the county jail for a term not exceeding one year or by both such fine or imprisonment. [L. '91, p. 356, §8.

§ 815. (2495*i*2) Straighten Willow Creek—Appropriation.

There is hereby appropriated out of any money in the state treasury, belonging to the internal improvement permanent fund the sum of six thousand dollars ($6,000), or so much thereof as may be necessary, for the purpose of straightening and changing the channel of Willow creek, to crib and construct a levee along the same, at and adjoining the city of Creede, Mineral county; *Provided*, In case there may be no money in the said fund, to meet said appropriation, or any part thereof, at the time of payment for said work, the state treasurer is hereby authorized and directed to pay the warrants drawn by the auditor of state for the amount herein appropriated, with valid state warrants invested in said fund, said warrants so invested to be received by the contractor of said work

at par, with accrued interest thereon, in full payment of contract price of said work or any part thereof, for the payment of which there may be no money in said fund. [L. '95, p. 127, §1: §§2495*i*2-2495*l*2, being §§2-4, of this act provide the procedure for this work.

§ 816. (2495*m*2-2495*j*3).

1. These sections were intended to represent the act creating state canalNo. 3, L. '01, pp. 369-374, §§1-24; also L. '02, pp. 162-169, §§1-10. This legislation is treated as repealed by the state releasing to the United States this canal. See §§2507*a*-2507*b*; same *post* §§883-4.

§ 817. Purifying Clear Creek.

Sections 2496-2501, L. '89, p. 311, §§1-6, provide for a commission for the making of tests with a view to the purification of the waters of Clear creek, and appropriating $5,000 therefor.

DIVISION XV —IRRIGATION CODE COMMISSION.

§ 818. Sections 2502-2507, L. '89, p. 466, §§1-6, provide for the appointment of an irrigation code commission and its duties. This commission made a report but it was not adopted.

DIVISION XVI.—FEDERAL AND INTERSTATE CONTROL.

§ 819. (2507*a*) **State Canal No. 3 Released.**

That the state of Colorado hereby releases and relinquishes to the United States of America all of its right, title and interest in and to state canal No. 3 and all rights and privileges acquired in connection therewith, and the board of control of said state canal No. 3 is hereby directed, upon the acceptance by the United States government, through such lawful means as said government shall determine, of the benefits of this act, and by its taking over the said canal, to release, relinquish and convey to the said United States government, or to such body or board as may be created by the congress of the United States to take over and complete said canal, all right, title, claim and interest of the state of Colorado and of said board of control of state canal No. 3 in and to the said canal and tunnel, and all rights, privileges and authority in connection therewith, and to do any and all things necessary and proper to fully and completely turn over to the United States government, or to any body or board so created by it, the property, rights and privileges herein referred to, such release, relinquishment and conveyance to be made without cost to the United States government; all to the end that the United States government may have full and complete authority to construct, maintain, operate and dispose of said canal and any and all water and rights in connection therewith. [L. '03, pp. 292-293, §1.

§ 820. (2507*b*) **Board to Report.**

Whenever the said state canal No. 3 shall have been accepted by the United States government, and all rights pertaining there to shall have been transferred, as directed in section 1 of this act, the said board of control shall thereupon render a detailed report to the

governor of its official actions, whereupon the duties of the said board of control shall terminate, and the offices pertaining thereto shall be vacated. [L. '03, p. 293, §2.

An Act to authorize an appropriation to make investigation, preliminary surveys and maps for reservoir sites on the Rio Grande river and its tributaries, and presenting same to the United States Government at Washington.—*Approved and in force April 7, '05.* [*L.* '05,. p 307, ch. 130.

Be it Enacted by the General Assembly of the State of Colorado:

§ 821. (1) Appropriation—Purpose.

There is hereby appropriated out of the internal improvement permanent fund, or internal improvement income fund, the sum of one thousand five hundred dollars ($1,500) for the purpose of making investigation, preliminary surveys and maps of reservoir sites on the Rio Grande river, or its tributaries, to conserve the flood waters of the same to the end that the matter may be presented to the United States government at Washington, showing the feasibility of constructing such reservoirs and enlisting its aid therein. [L. '05, p. 307, §1.

§ 822. (2) Commission—Appointment of.

There is hereby created a commission, consisting of four men, one to be appointed by the board of county commissioners of Saguache county, one to be appointed by the board of county commissioners of Rio Grande county, one to be appointed by the board of county commissioners of Costilla county, and one to be appointed by the board of county commissioners of Conejos county, to direct and supervise the work herein specified. Said commissioners to receive only actual traveling expenses, while engaged in their work. The auditor of state is hereby directed to draw his warrants for the same upon the vouchers duly issued and approved by said commission. [L. '05, p. 307.

LAND COMMISSIONERS.

Parts of an act concerning the State Board of Land Commissioners.—*Approved April* 12, '05, *In force July* 12, '05. [*L.* '05, pp. 328-9, 332-3-4.

§ 823. (22) Sale of Land to U. S. for Irrigation Projects.

Any state lands needed by the United States for irrigation works, other than right of way for roads, bridges, canals, ditches, tunnels, pipe lines, telephone and transmission lines, shall be sold to the United xtates at a price not to exceed three dollars and fifty cents ($3.50) per acre, and the state board of land commissioners shall direct the governor, secretary of state and register to execute and sign, as provided in this act, on behalf of the state, a proper deed or other instrument of writing for such lands. [L. '05, p. 328, §22.

§ 824. (23) Sales to Settlers—National Irrigation Areas—Advertise Land Sales—Aliens—Improvements.

The state board of land commissioners may at any time direct the sale of any state lands, except as provided in this act, in such parcels, to actual settlers only, or to persons who shall improve the same, as they shall deem for the best interests of the state and the promotion of the settlement thereof; *Provided*, That no lands belonging to the state, within the areas to be irrigated from works constructed or controlled by the United States or its duly authorized agents, shall hereafter be sold except in conformity with the classification of farm units by the United States, and the title to such lands shall not pass from the state until the applicant therefor shall have fully complied with the provisions of the laws of the United States and the regulations thereunder concerning the acquisition of the right to use water from such works, and shall produce the evidence thereof duly issued. After the withdrawal of lands by the United States for any irrigation project, no application for the purchase of state lands within the limits of such withdrawal shall be accepted, except upon the conditions prescribed in this section. All sales under this act, except those to the United States, shall be advertised in four consecutive issues of some weekly paper of the county in which such land is situated, if there be such paper; if not, then in some paper published in an adjoining county, and in such other papers as the board may direct. The advertisement shall state the time, place and terms of sale, and the minimum price per acre fixed by the board of each parcel, below which no bid shall be received; *Provided*, That in all cases the land shall be offered in legal subdivisions of not less than forty (40) acres, or more than one hundred and sixty (160) acres; *Provided*, That sales of state lands shall be made to citizens of the United States, and to those who have declared their intention to become such only. If any land be sold on which surface improvements shall have been made by a lessee, said improvements shall be appraised under the direction of the state board. When lands on which such improvements have been made are sold, the purchasers, if other than the owner of said improvements, shall pay the appraised value of said improvements to the owner thereof, taking a receipt therefor, and he shall deposit such receipt with the state board before he shall be entitled to a patent or certificate of purchase. All such receipts shall be filed and preserved in the office of the state board of land commissioners. [L. '05, p. 329, §23.

§ 825. Rights of Way—Donations for School Houses—Reservation—Grant of Right of Way to U. S.

The state board of land commissioners may grant the right of way across or upon any portion of state land, upon such terms as the board shall determine, for any ditch, reservoir, railroad, public highway, telegraph or telephone line, and may grant land for the purpose of building district school houses, and may direct the governor, secretary of state and register to execute and sign, as provided by this act, on behalf of the state, a proper deed or other instrument of writing, for such right of way or grant; *Provided*, That this section shall not be construed to grant authority to convey any such land, except for the purposes above set forth; And, *Provided, further*, That whenever lands granted for any of the pur-

poses mentioned in this section shall cease to be used for such purposes, said lands shall revert to the state of Colorado, upon notice to that effect being served at their last known postoffice address upon the person to whom such grant was made. The right of way is hereby given, dedicated and set apart, to the United States, to locate, construct and maintain such roads, bridges, canals, ditches, tunnels, pipe lines, telephone and transmission lines as may be constructed for the purpose of irrigation, by authority of the United States, over and through any of the lands which are now, or may be, the property of the state. All conveyances of state lands hereafter made shall contain a reservation of such rights of way. [L. '05, p. 332-3, §35.

§ 826. Sales of Arid Land to Secure Irrigation on Other Lands—Contracts—No Title Pass till Ditch Completed.

For the purpose of furnishing irrigation for state lands, the state board of land commissioners is hereby authorized, when, in their judgement [judgment], the interests of the state may be subserved thereby, to sell at public sale, at such place as the board may fix, at not less than the appraised value thereof, which in no case shall be less than the minimum price of three dollars and fifty cents ($3.50) per acre, any tract of arid land belonging to the state; *Provided*, That not more than one-half section of land shall be sold, and in alternate half sections, to any responsible person or persons on condition that said person or persons construct an irrigating ditch in such locality, and of sufficient capacity to furnish water for the entire tract, and so located that said tract may be irrigated therefrom; *Provided*, That before any of the state lands shall be offered for sale, the party desiring to purchase said lands and construct a ditch shall enter into a contract with the board guaranteeing to bid at least the minimum price per acre, and to complete such ditch within given time, which time shall be fixed by the board in the contract. The contract shall further provide that the party constructing such ditch shall furnish water for the remaining one-half of the state lands at such reasonable rates as the board and the parties building such ditch or canal may agree upon. Such contract shall be drawn by the attorney general, and signed by the governor and register of the board, and by the party desiring to construct such ditch; *And, Provided, further*, That if any person, other than the person making application for the purchase of said lands shall be the highest bidder at the public sale thereof, such bidder shall, within such reasonable time as the board may fix, enter into a contract and bond, as required by the provisions of this act, for the construction of said ditch, and for the furnishing of water therefrom; and in the event of his failure to furnish a satisfactory bond and enter into the said contract within the time fixed, then such bid shall be disregarded and such public sale shall be void and of no effect. The board shall make the sale upon like conditions as other state lands are sold, and shall require a good and sufficient bond from the party desiring to construct such ditch, conditioned for the faithful performance of the contract and the conditions of the sale. And in no case shall the title of any of said lands pass from the state until the ditch shall have been completed and accepted by the board. [L. '05, p. 333-4, §36.

An Act to direct the state board of land commissioners to regulate the distribution of water from state canals and reservoirs.—*Approved April* 10, 1893. *In force July* 9, 1893. L. '93, p. 404.

§ 827. (3657*a*) Land Commissioners Regulate Distribution of Water.

Until otherwise authorized by law, the board of land commissioners is hereby directed to regulate the distribution of water from state canals and reservoirs under such rules and regulations as said board shall deem to be for the best interests of the state. "And to charge and collect rental for the carriage of water therein." [L. '93, p. 404, §1.

DESERT LANDS.

An Act to provide for the acceptance by the state of Colorado from the United States of the benefits of the act of congress as to desert lands, approved August 18, 1894; and providing for the irrigation, reclamation, occupation and disposal of the same.—*Approved March* 15, 1895. *In force March* 15, 1895, L. '95, p. 157.

§ 828. (3662*a*) Acceptance of Benefit of Acts of Congress.

That the state of Colorado hereby accepts the conditions of section four (4) of an act of congress entitled "An act making appropriations for sundry civil expenses of the government for the fiscal year ending June 30, 1894, and for other purposes, approved August 18, 1894," together with all the grants of land to the state under the provisions of the aforesaid act. [L. '95, p. 157, §1.

§ 829. (3662*b*) Control of Desert Land.

The selection, management and disposal of said land shall be vested in the state board of land commissioners as at present constituted. [L. '95, p. 157, §2.

§ 830. (3662*c*) Register of Land Board Act as Secretary.

The register of the land board shall act as secretary, and it shall be his duty to keep a careful record of the transactions of the board in substantially bound book or books, to be kept for that purpose, and which shall be known as the record and proceedings of the state board of land commissioners under this act. [L. '95, p. 157, §3.

§ 831. (3662*d*) Receive and File Proposals.

The register of the land board shall have the custody of the records of the board; shall receive and file all proposals for the construction of irrigation works to reclaim lands selected under the provisions of this act, prepared and keep for public inspection maps or plats on a scale of two inches to the mile of all lands selected, receive entries of settlers on these lands and hear or receive the final proof of their reclamation under rules and regulations to be prescribed by the state board of land commissioners, and do any and all work required by the board in carrying out the provisions of this act. He shall have authority to administer oaths whenever necessary in the performance of his duties as register and secretary of the board. [L. '95, pp. 157-158 §4.

§ 832. (3662*e*) File Request for Section—Proposal—Land Board Make Rules and Regulations.

Any person, company of persons, associations or incorporated company desiring to construct ditches, canals or other irrigation works to reclaim land under the provisions of this act, shall file with the board a request for the selection on behalf of the state by the board of the land to be reclaimed, designating said land by legal subdivisions. This request shall be accompanied by a proposal to construct the ditch, canal or other irrigation works necessary for the complete reclamation of the land asked to be selected. The proposal shall be prepared in accordance with the rules of the board and with the regulations of the department of the interior. It shall state the postoffice address and residence of the parties, the source of water supply, the point of diversion, the place of storage, if stored, the location and dimensions of the proposed works, the estimated cost thereof and the carrying capacity of the ditch or canal, the price and terms at which perpetual water rights will be sold to settlers on the land reclaimed, said perpetual right to embrace a proportionate concurrent interest in the ditch, canal or other irrigation works, together with all rights and franchises attached thereto, and all water rights sold or otherwise held under said ditch or canal to have equal rights as to priority; and all contracts for the sale of water rights under this act shall be in form and upon conditions, approved by the board. In the case of incorporated companies it shall state the name of the company, the purpose of the incorporation, the name and places of residence of its directors and officers, the amount of its authorized and of its paid-up capital, and shall be organized under the laws of Colorado. If the applicant is not an incorporated company, the proposal shall set forth the name or names of the party or parties, and such other facts as will enable the board to determine his or their financial ability to carry out the proposed undertaking, or as may be required by the board. Nothing herein shall be construed to prevent the entry and reclamation of land under this act by individuals, duly qualified, either singly or acting together, and the state board of land commissioners shall make such rules and regulations not inconsistent with said act of congress, or the rules and regulations of the department of the interior, as may be necessary to allow the acquirement of individual water rights for application to, and reclamation of specific tracts of land, not exceeding one hundred and sixty acres of land for each person, and the requirements of this act as to plats, maps, examinations, reports, bonds and contracts may, by such rules and regulations, be so modified as to effectuate and assist the reclamation and entry of land by individuals. [L. '95, pp. 158-159, §5.

§ 833. (3662*f*) Certified Check Accompany Proposals.

A certified check payable to the state board of land commissioners for a sum of not less than two hundred and fifty (250) dollars and not more than two thousand five hundred (2,500) dollars, as may be determined by the rules of the board, shall accompany each such request and proposal, the same to be held as a guarantee of the execution of the contract with the state, in accordance with its terms, by the party submitting such proposal, in case of the approval of the same and the selection of the land by the board, and

to be forfeited to the state in case of failure of said parties to enter into a contract with the state, in accordance with the provisions of this act. [L. '95, p. 159, §6.

§ 834. (3662*g*) File Application With State Engineer for Permit.

The person, company of persons, associations or incorporated company making application to the board for the selection of lands by the state shall have filed with the state engineer an application for a permit to appropriate water for the reclamation of the lands described in the request to the board. This application for permit shall be of a form prescribed by the state engineer, and shall be accompanied by two copies of the map of the land to be selected, and which shall show accurately the location and dimensions of the proposed irrigation works. The maps of the lands and proposed irrigation shall be prepared in accordance with the regulations of the state engineer's office and the rules of the department of the interior. [L. '95, pp. 159-160, §7.

§ 835. (3662*h*) Secretary Examine Proposal—Engineer's Report.

Immediately upon the receipt of any request and proposal as designated in section five (5), it shall be the duty of the secretary of the board to examine the same and ascertain if it complies with the rules of the board and the regulations of the department of the interior. If it does not, it is to be returned for correction; but if it does so comply, it shall be submitted to the state engineer, who shall examine the same and make a written report to the board, stating whether or not the proposed works are feasible; whether the proposed diversion of the public waters of the state will prove beneficial to the public interest; whether there is sufficient unappropriated water in the source of supply, and whether or not a permit to divert, store and appropriate water through or by the proposed works has been approved by him; whether the capacity of the proposed works is adequate to reclaim the land described; and whether or not the maps filed in his office comply with the requirements of said office, and the regulations of the department of the interior; also, whether or not the lands proposed to be irrigated are desert in character and such as may properly be set apart under the provisions of the aforesaid act of congress, and the rules and regulations of the department of the interior thereunder. Whenever the state engineer shall be unable, from an examination of the maps and field notes submitted for his examination, to determine whether or not the proposed irrigation works are feasible and adequate, or whether or not the proposed diversion of the public water is beneficial to public interest; and whether or not the lands proposed to be irrigated are of such a character as to come under the provisions of the aforesaid act of congress, he shall so report to the board and also report the estimated cost of a survey and examination; and it shall be his duty to make, or cause to be made, by some qualified assistant, such survey or examination as will enable him to report intelligently thereon to the board, when directed by said board to make such examination or survey. [L. '95, pp. 160-161, §8.

§ 836. (3662*i*) Duty of Board and Register.

On receipt of the report of the state engineer, the register shall place the request and proposal, with the engineer's report thereon,

before the board for its consideration. In case of approval the board shall instruct the register to file in the local land office a request for the withdrawal of the land described in said proposal. No request on which the state engineer has reported adversely, either as to the water supply, the feasibility of the construction, or capacity of the works, or as to the character of the lands sought to be irrigated, shall be approved by the board. [L. '95, p. 161, §9.

§ 837. (3662*j*) Proposed Irrigation Works Rejected—Notice.

In case the state engineer shall report adversely upon the proposed irrigation works, or where requests and proposals are not approved by the board, the board shall notify the parties making such proposal of such action and the reasons therefor. The parties so notified shall have sixty (60) days in which to submit another proposal; but the board may, at its discretion, extend the time to six (6) months. [L. '95, p. 161, §10.

§ 838. (3662*k*) Contract—Bond.

Upon the withdrawal of the land by the department of the interior, it shall be the duty of the board to enter into a contract with the parties submitting the proposal, which contract shall contain complete specifications of the location, dimensions, character and estimated cost of the proposed ditch, canal or other irrigation work, and state the price and terms upon which the state is to dispose of the lands to settlers, and such other conditions and provisions as the board may direct. This contract shall not be entered into on the part of the state until the withdrawal of these lands by the department of the interior and the filing of a satisfactory bond on the part of the proposed contractor for irrigation works, which bond shall be in a penal sum equal to five (5) per cent. of the estimated cost of the works, and to be conditioned for the carrying out of the provisions of the contract with the state. [L. '95, pp. 161-162, §11.

§ 839. (3662*l*) Time for Construction—Forfeit.

No proposal shall be considered by the board which requires a greater time than five years for the construction of the works, and all proposals shall state that the work shall begin within six months from the date of contract, that at least one-tenth of the construction work shall be completed within two years from the date of said contract; that the construction shall be prosecuted diligently and continuously to completion, and that a cessation of work under the contract with the state for a period of six (6) months after the second year, without the sanction of the board, will forfeit to the state all rights under said contract. [L. '95, p. 162, §12.

§ 840. (3662*m*) Failure to Begin Work—Notice—Forfeit—Application of Funds.

Upon the failure of any parties, having contracts with the state for the construction of irrigation works, to begin the same within the time specified by law, or to carry on said work as in their contract provided, or to complete the same within the time or in accordance with the specifications of the contract with the state land board and the provisions of this act, it shall be the duty of the register to give such parties written notice of such failure; and if, after a

period of sixty (60) days, they have failed to proceed with the work or to conform to the specifications and conditions of their contract with the state, it shall be the duty of the state land board to declare the bond and contract of such parties forfeited to the state, and notify the contractors by letter to the address given in the proposal, and to give notice once a week, for a period of four weeks, in some newspaper of general circulation in the county in which the work is situated, and in one newspaper at the state capitol, in like manner and for a like period, of the forfeiture of said contract; and that upon a day fixed, proposals will be received at the office of the register, in the capitol at Denver, for the purchase of the incompleted works and for the completion of said contract. The time for receiving said bids to be at least sixty (60) days after the issuing of the first notice of forfeiture. The money received from the sale of partially completed works under the provisions of section 12 of this act, shall first be applied to the expense incurred by the state in their forfeiture and disposal, to satisfying the bond, and to the satisfaction, *pro rata*, of adjudicated liens for labor or materials; and the surplus, if any exists, shall be paid to the original contractors with the state. [L. '95, pp. 162-163, §13.

§ 841. (3662*n*) State Not Responsible for Failure of Contractors

Nothing in this act shall be construed as authorizing the board to obligate the state to pay for any work constructed under any contract, or to hold the state in any way responsible to settlers for the failure of contractors to complete the work according to the terms of their contracts with the state. [L. '95, p. 163, §14.

§ 842. (3662*o*) Land Open for Settlement—Notice.

Immediately upon the withdrawal of any land for the state by the department of the interior, and the inauguration of work by the contractors, it shall be the duty of the board, by publication once each week, in one newspaper of the county, in which said lands are situated; and in one newspaper at the state capitol for a period of four weeks; to give notice that said land is open for settlement, and the price and terms upon which said land will be sold to settlers by the state. [L. '95, p. 163, §15.

§ 843. (3662*p*) Application to Enter—Contract for Water Right.

Any citizen of the United States, or any person having declared his intention to become a citizen of the United States, over the age of twenty-one years, may make application, under oath, to the board, to enter any of said land in an amount not to exceed one hundred and sixty (160) acres for any one person; and such application shall set forth that the person desiring to make such entry does so for the purpose of actual reclamation, cultivation and settlement in accordance with the act of congress, and the laws of this state relating thereto; and that the applicant has never received the benefit of the provisions of this act, to an amount greater than one hundred and sixty (160) acres, including the number of acres specified in the application under consideration. Such application must be accompanied by a certified copy of a contract for a perpetual water right, made and entered into by the party making application, with the person, company or association who have been authorized by

the board to furnish water for the reclamation of said lands; and if said applicant has at any time entered land under the provisions of this act he shall so state in his application, together with the description, date of entry and location of said land. The board shall file in its office the application and papers relating thereto, and, if allowed, issue a certificate of location to the applicant. All applications for entry shall be accompanied by a payment of twenty-five cents per acre, which shall be paid as a partial payment on the land if the application is allowed; and all certificates, when issued, shall be recorded in a book to be kept for that purpose. If the application is not allowed, the twenty-five cents per acre accompanying it shall be refunded to the applicant. The board shall dispose of all lands accepted by the state under the provisions of this act at a uniform price of fifty cents per acre, half to be paid at the time of entry and the remainder at the time of making final proof by the settler. [L. '95, pp. 163-164, §16.

§ 844. (3662q) Moneys Deposited with State Treasurer—Expenses—Trust Fund.

As provided in the act of congress, all moneys received by the board from the sale of lands selected under the provisions of this act shall be deposited with the state treasurer, and such sums as may be necessary shall be available for the payment of the expenses of the board and of the state engineer's office incurred in carrying out the provisions of this act. Such expenses shall be paid by the state auditor in the manner provided by law, upon vouchers duly approved by the board for the work performed under its direction, and by the state engineer for all work performed by the state engineer's office; and any balance remaining over and above the expense necessary to carry out the provisions of this act shall constitute a trust fund in the hands of the state treasurer, to be used for the reclamation of other desert lands. [L. '95, pp. 164-165, §17.

§ 845. (3662r) Duty of Settler in Reclaiming Land—Proof—Fees.

Within one year after any person, company of persons, association or incorporated company, authorized to construct irrigation works under the provisions of this act, shall have notified the settlers under such works that they are prepared to furnish water under the terms of their contract with the state, the said settlers shall cultivate and reclaim not less than one-sixteenth part of the land filed upon, and within two years after the said notice, the settler shall have actually irrigated and cultivated not less than one-eighth of the land filed upon, and within three years from the date of said notice, the settler shall appear before the register, or a judge or clerk of the district court, or judge of the county court, in the county in which such land is situated, as designated by the register, and make final proof of reclamation, settlement and occupation, which proof shall embrace evidence that he has a perpetual water right for his entire tract of land sufficient in volume for the complete irrigation and reclamation thereof; that he is an actual settler thereon; and has cultivated and irrigated not less than one-eighth part of said tract, and such further proof, if any, as may be required by the regulations of the department of the interior or the board. The officer taking this proof shall be entitled to receive a fee, to be fixed by the state board of land commissioners, which fee

shall not exceed five (5) dollars and be paid by the settler and shall be in addition to the price paid to the state for the land. All proofs so received shall be submitted by the register to the board and shall be accompanied by the last final payment for said land, and, on the approval of the same, by the said board, they shall be forwarded to the secretary of the interior, with the request that a patent to said lands be issued to the state. [L. '95, pp. 165-166, §18.

§ 846. (3662s) Patent—Lien for Water Payments—Contract Recorded—Sales Advertised—Certificate.

Upon the issuance of a patent to any lands by the United States to the state, notice shall be forwarded to the settler upon such land. It shall be the duty of the board, under the signature of its president, and attested by its secretary, to issue a patent to said lands from the state to the settler. All water rights acquired under the provisions of this act shall attach to and become appurtenant to the land as soon as the title passes from the United States to the state. Any person, company or association furnishing water for any tract of land shall have a first and prior lien on said water right and land upon which said water is used, for all deferred payments for said water right; said lien to be in all respects prior to any and all other liens created or attempted to be created by the owner and possessor of said land; said lien to remain in full force until the last deferred payment for the water right is fully paid and satisfied according to the terms of the contract under which said water right was acquired; the contract for the water right upon which the aforesaid lien is founded to be recorded in the office of the county clerk of the county where said land is situate. That upon default of any of the deferred payments secured by any lien under the provisions of this act, the person, company of persons, association or incorporated company holding or owning said lien, may foreclose the same according to the terms and conditions of the contract granting and selling to the settler the water right; all sales to be advertised in a newspaper or [of] general circulation, published in the county where said land and water right is situate, for six (6) consecutive weeks, and to be sold to the highest bidder at the front door of the courthouse of the county, or such place as may be agreed upon by the terms of the aforesaid contract; and the sheriff of said county to give all notices of sale and to sell all property, and to make and execute a good and sufficient deed to the purchaser thereof hereinafter provided. And at such sale no person, company of persons, association or incorporated company, owning or holding any lien, shall bid in or purchase any land or water right at a less price than the amount due on said deferred payment for said water right and land, and the costs incurred in making the sale of said land and water right. The sheriff shall execute a certificate of sale as in case of sale of an execution subject in all respects to redemption as in such case; and if not redeemed the sheriff shall execute a deed as upon sale on execution. [L. '95, pp. 166-167, §19.

§ 847. (3662t) Map of Canal.

The maps of the lands selected under the provisions of this act shall show the location of the canals or other irrigation works approved in the contract with the board, and all lands filed upon shall

be subject to the right of way of such canals or irrigation works; said right of way to embrace the entire width of the canal and such additional width as may be required for its proper operation and maintenance, the width of right of way to be specified in the contracts provided for in this act. [L. '95, p. 167, §20.

§ 848. (3662*u*) Rules—Reports.

The board shall provide suitable rules for the filing of proposals for constructing irrigation works, and for the entry and payment of the land by settlers, and for the forfeiting of entry by settlers upon failure to comply with the provisions of this act. There shall be kept in the office of the board, for public inspection, copies of all maps, plats, contracts for the construction of irrigation works, and of the entries of land by settlers. It shall require from each person, company of persons, association or incorporated company engaged in the construction of irrigation works, under the provisions of this act, an annual report, to be submitted to the board on or before the first day of November of each year, this report to show the number of water rights sold, the number of users of water under said irrigation works, the legal subdivisions of land for which water is to be furnished, the names of the officers of the company, the acreage of land which the said irrigation works is prepared to supply with water, and such other data as the board sees fit to require. The rules required by this section may be waived in the case of irrigation works being constructed by a person, colony or association of persons to furnish water for land settled upon and being reclaimed by themselves. [L. '95, pp. 167-168, §21.

§ 849. (3662*v*) Employees—Fees—Fee Book.

The board shall prescribe the duties of all its employees, and shall collect the following fees:

For filing each application, one dollar; for filing each proof, one dollar; for issuing each patent, one dollar; for making certified copies of papers or records, the same fee as provided for to be charged by the secretary of state for like services.

And a fee book shall be kept by the register, showing all fees received by him from any source whatever. The money collected for fees shall be paid to the treasurer of the state and by him credited to the fund created by virtue of this act. [L. '95, p. 168, §22.

§ 850. (3662*w*) Report of Board.

The board shall issue on or before the thirtieth day of November of each year, a report setting forth in detail the names, location and character of the irrigation works in process of construction, the acreage and legal sub-divisions of land intended to be reclaimed, the estimated cost of said irrigation works, the price of water rights from such irrigation works, and the terms of payment for both water rights and land. Not less than one thousand copies of such report shall be printed for gratuitous distribution. [L. '95, p. 168, §23.

§ 851. (3662x) Repeal.

All laws or parts of laws inconsistent with the provisions of this act are hereby repealed. [L. '95, p. 168, §24.

[Ch. 107, "Revenue," 2 and 3 Mills' Ann. St.]

TAXATION.

§ 852. (3809) Classes of Property Exempt from Taxation.

The following classes of property shall be exempt from taxation, to wit:

Fifth.—Ditches, canals and flumes, owned and used by individuals or corporations, exclusively for irrigating lands of such individuals or corporations, or the individual members of such corporations, shall not be separately taxed so long as they shall be owned and used exclusively for such purpose. [L. '02, p. 47, §17.

§ 853. (3927f2) Property in More than One County.

Whenever a corporation is possessed of any works or properties situate in more than one county, as irrigating canals, reservoirs and like properties for collecting in one county waters, to be conveyed to and distributed in another county or counties, or pipes, conduits and like properties for conveying water from one county to another county or counties, there to be distributed, the said works and properties, in case of non-payment of the tax thereon in either county shall be collected in the same manner specified in the last preceding section. [L. '02, pp. 155, 156, §227.

[Ch. 124, "Towns and Cities," 2 and 3 Mills' Ann. St.]

POWERS OF CITY COUNCIL AND BOARD OF TRUSTEES.

§ 854. (4403 sixth subd.) Indebtedness.

To contract an indebtedness on behalf of the city or town and upon the credit thereof, by borrowing money or issuing the bonds of the city or town, for the following purposes, to wit: * * * * for the purpose of the purchase or construction of a canal or canals or some suitable system for supplying water for irrigation in the city or town; * * * * The total amount of indebtedness for all purposes shall not at any time exceed three per centum of the total assessed valuation of the taxable property in the city or town, except such debt as may be incurred in supplying the city or town with water and water-works, and no loan for any purpose shall be made, except it be by ordinance, which shall be irrepealable until the indebtedness therein provided for shall be fully paid, specifying the purpose to which the funds to be raised shall be applied and providing for the levying of a tax not exceeding, in total amount, for the entire indebtedness of the city or town, excepting such debt as may be incurred in supplying the city or town with water or water-works, twelve mills on each dollar of valuation of the taxable property within the city or town sufficient to pay the annual interest

and extinguish the principal of such debt within the time limited for the debt to run, which shall not be less than ten years nor more than fifteen years, and providing that said tax, when collected, shall only be applied to the purpose in said ordinances specified, until the indebtedness shall be paid and discharged; but no such debt shall be created "except the supplying the city or town with water" unless the question of incurring the same shall, at a regular election of officers for the city or town, be submitted to a vote of such qualified electors of the city or town as shall, in the next year preceding, have paid a property tax therein and a majority of those voting upon the question by ballot deposited in a separate ballot box shall vote in favor of creating such debt. [L.'91, pp. 386-387, §1.

§ 855. (4403 eleventh subd.) **Water Courses.**

To deepen, widen, dock, cover, wall, alter or change the channel of water courses.

§ 856. (4403 fifty-eighth subd.)

To authorize the construction of mills and mill races, irrigating or mining ditches and feeders on, through or across the streets of the city or town, at such places and under such restrictions as they shall deem proper.

§ 856*a*. (4403 sixty-eighth subd.) **Water-works Outside Limits.**

They shall have power to construct or authorize the construction of such waterworks, without their limits, and for the purpose of maintaining and protecting the same from injury and the water from pollution, their jurisdiction shall extend over the territory occupied by such works, and all reservoirs, streams, trenches, pipes and drains, used in and necessary for the construction, maintenance and operation of the same, and over the stream or source from which the water is taken, for five miles above the point from which it is taken; and to enact all ordinances and regulations necessary to carry the power herein conferred into effect.

§ 857. (4403 seventy-third subd.) **May Take Water.**

They shall have the right and privilege of taking water in sufficient quantity, for the purpose hereinbefore mentioned, from any stream, creek, gulch or spring in the state; *Provided*, That if the taking of such water in such quantity shall materially interfere with or impair the vested right of any person or persons or corporation, heretofore acquired, residing upon such creek, gulch or stream, or doing any milling or manufacturing business thereon, they shall first obtain the consent of such person or persons or corporation, or acquire the right of domain, by condemnation, as prescribed by the constitution and laws upon that subject, and make full compensation or satisfaction for all the damages thereby occasioned to such person or persons or corporation.

§ 858. (4540*a*) **Towns, Cities Purchase Water and Water Rights.**

Incorporated towns and cities shall have power to purchase water and water rights for the purpose of supplying such towns and cities, and the inhabitants thereof with water, in all cases where

condemnation would lie to obtain the same under subdivision 73 of section 14, chapter 109, of the general statutes of Colorado, and when deemed necessary and proper, the board of trustees or city council of such town or city, may purchase and hold the lands with which said water right is connected, whether the same be within or beyond the corporate limits thereof. [L. '91, p. 385, §1.

§ 859. (454*b*) May Divert Waters and Sell Lands.

Such towns and cities shall have authority to divert the waters acquired by purchase as aforesaid, to the amount and extent heretofore lawfully appropriated, to the use of such town or city and the inhabitants thereof, and may sell such lands whenever the board of trustees or city council of such town or city may deem such course advisable. [L. '91, p. 385, §2.

§ 860. (454*c*) Acts Heretofore Done Ratified and Confirmed.

The right to hold and retain water rights or such lands and water rights as may heretofore have been purchased by any town or city in this state for the purpose of providing water for the use thereof, or that of its inhabitants, is hereby given and ratified and confirmed to such town or city; and also the right to divert the water belonging to such right or rights to the use of such town or city and the inhabitants thereof; and to sell and dispose of such lands so purchased separate and apart from the water rights as provided in section 2 of this act. [L. '91, p. 385, §3.

(*c*) *Forms.*

§ 861. Form of Petition for Adjudication of Rights to Use Water for Beneficial Purposes other than Irrigation.

State of Colorado, } *ss.* In the District Court.
County of..... }

In the matter of the adjudication of priorities of water rights in Water District number_____in the State of Colorado.

Application of_____ for the establishment and decree of_____ priorities and rights to the use of water for beneficial purposes other than irrigation in water district number_____ in the State of Colorado, and for the adjudication of priorities of rights to the use of water for purposes other than irrigation, between the several ditches, canals, reservoirs and other claimants of water in said district for such purposes.

To the Honorable District Court of the_____Judicial District of the State of Colorado, within and for said County of_____and to_____Judge of said Court:

Your petitioner,_____represents:

1st. That it is a municipal corporation duly organized and existing under the laws of the State of Colorado, providing for the incorporation of cities and towns.

2nd. That it is the owner and in possession of that certain water works system used for diverting water from_____and_____ in Water District number_____ of the State of Colorado, for supplying the town of_____ and the citizens and inhabitants thereof and persons using or securing water therein for beneficial pur-

poses other than irrigation, with water for domestic, lawn, sprinkling, power, storage, steam, manufacturing and other beneficial purposes other than irrigation; that said water works system includes _____reservoirs and other storage works, pumping plants, and that certain ditch known as the _____ditch, and other means of securing water for said purposes, all located in Water District number_____of the State of Colorado, and taking water from____ natural streams in said Water District, for the purposes aforesaid, other than irrigation.

3rd. That your petitioner is interested as aforesaid in the settlement and adjudication of priority rights for the use of water from said stream and in said Water District number_____, for beneficial purposes other than irrigation, between itself and other owners of claims for like purposes, of water in said Water District number_____; that no adjudication of priority rights for the use of water in said District for beneficial purposes other than irrigation, has ever been had, taken or commenced, and your petitioner is desirous that the priorities claimed by it, and in which it is interested as aforesaid, shall be adjudicated at an early date.

4th. That your petitioner verily believes that but few claims for priority to the use of water for purposes other than irrigation will or can be made, and that but little time will be required in taking the testimony in said proceeding; that it is practicable and expedient to proceed in open court to take such testimony and hear and determine such priorities and that by so taking testimony in open court a speedy determination can be secured and the expenses of such adjudication to all parties will be greatly curtailed. Wherefore petitioner prays this Honorable Court to proceed to an adjudication of the priorities and rights of petitioner to the use of water for the beneficial purposes aforesaid, other than irrigation, as against all persons, associations and corporations having or claiming water rights appropriated from natural streams and water courses, or other sources or interested in ditches, canals, reservoirs, or otherwise in said Water District number_____for beneficial purposes other than irrigation, and to an adjudication of the priorities of right to the use of water for beneficial purposes other than irrigation between the several owners and claimants of water rights in said Water District number_____ under the provisions of the constitution and statutes of the State of Colorado in such case made and provided, and that evidence be heard, proceedings be taken and adjudication be had in open court without the appointment of a referee, if the Court shall deem the same practicable, and that all orders and directions may be duly given to that end.

_____
_____ Petitioner.
Attorneys.

Verification.

§ 862. Petition for Adjudication of Priority for Irrigation Purposes.

Caption same as §861.

Your petitioners respectfully represent that they are the owners, respectively, of the_____and_____(*ditches or reservoirs*) located in said Water District, taking and using water from_____ and the tributaries thereof, in said Water District, for irrigation

purposes, in the cultivation of lands adjacent to and under said (*ditches or reservoirs*); that the petitioners herein are interested, as such owners aforesaid, in the settlement and adjudication of the priorities of right to the use of the waters of said stream, and the tributaries thereof, for irrigation purposes, between the several ditches, canals and reservoirs, and owners of water rights in said Water District No.____

Wherefore, your petitioners pray, that your Honor will proceed to an adjudication of the priorities of rights to the use of water for irrigation purposes, between the several ditches, canals and reservoirs and the owners of water rights in said Water District No.____, in said State, under the provisions of the constitution and laws of the said State of Colorado, in that behalf provided.

Verification. ---

§ 863. Notice by Referee.

In the matter of the adjudication of the Priorities of water rights in Water District No.____

Whereas, By an order of (*the judge*) of the District Court of the____Judicial District in the State of Colorado, in and for the County of____, the undersigned was duly appointed referee in the above matter, of which order the following is a copy. (*Copy of order.*)

Now Therefore, I do hereby give notice to all persons, associations or cororations, interested as owners or consumers of water, in said Water District No.____ that I will, at the places and on the days hereinafter designated, attend for the purpose of hearing and taking evidence, touching the priority of rights of the several ditches, canals and reservoirs in said Water District, and will continue such hearing from day to day, until all such evidence shall be taken, to wit:

At____at the office of____on the____day of____A. D. ____at____M.

At____in the County court room on the____day of____ A. D.____at____M.

And I do hereby notify all persons, associations and corporations interested as owners or consumers of water in said Water District, to attend by themselves, their agents or attorneys, at the times and places mentioned herein, and then and there file a statement of claim, in case no such statement has been heretofore filed in the office of the Clerk of the District Court of____ County aforesaid; such statement to be under oath showing the ditch, canal or reservoir in which the interest is claimed, together with the names of the owners thereof and such other particulars as are prescribed by law; and all persons, interested may then and there present proofs for or against any priority of right by appropriation sought to be shown by any party, by or through any such ditch, canal or reservoir, either as owner or consumer of water obtained therefrom.

Dated this____day of____A. D. ____

Referee.

§ 864. Statement of Claim for Priority.

State of Colorado, } ss.
County of.....}

In the District Court.

In the matter of the adjudication of Priorities of Water Rights in Water District No.....

The undersigned.....hereby makes statement of claim in the above entitled matter for the purpose of securing the benefits of the law of the State of Colorado, in relation to the adjudication of priorities of water rights, and says:

1st. That he is the owner of the (*ditch, canal or reservoir*) hereinafter named and described, situated in said Water District No.....; that his full name is.....and his post-office address is.....

2nd. That the name of said (*ditch, canal or reservoir*) is.....

3rd. That the headgate of said (*ditch, canal or feeder of said reservoir*) is located on the.....bank of.....(*creek or river*) from which natural stream said (*ditch, canal or reservoir*) derives and diverts its supply of water, at a point whence.....corner of Section.....Township.....Range.....bears.....feet.

4th. That from said headgate said (*ditch, canal or feeder*) runs in a general.....direction a distance of .....; thence..... (here insert a general description of the course of the ditch or canal.)

5th. That the length of said (*ditch, canal or feeder*) is .....its width at the bottom is.....feet, and at high water surface line .....feet; the depth of water carried thereby is.....; its grade is.....per mile.

6th. That the carrying capacity of said (*ditch, canal or feeder*) is.....cubic feet per second of time. (*That the capacity of said reservoir is.....cubic feet.*)

7th. That the amount of water claimed by appropriation under and by means of the construction of said (*ditch or canal*) is .....cubic feet per second of time. (*That the amount of water claimed under and by means of the construction of said reservoir is .....cubic feet.*)

8th. That work was commenced on said (*ditch, canal or reservoir*) on the.....day of.....A. D. .. from which time said appropriation of water is claimed to date.

9th. That the number of acres of land lying under and along the line of said (*ditch, canal or reservoir*) and being irrigated by water obtained therefrom is.....acres.

10th. That the size of said (*ditch, canal or reservoir*) as (*enlarged or extended*) is: Its length is.....; its width at the bottom is..... and at the high water surface line.....its depth of water is.....; and grade..... per mile.

11th. That the increased capacity of said (*ditch or canal*) arising from such enlargement is..... cubic feet per second of time. (*That the increased capacity of said reservoir arising from such enlargement is.....cubic feet.*)

12th. That work was commenced on such (*enlargement or extension*) on the.....day of.....A. D.....from which time the additional appropriation of water by means of such (*enlargement or extension*) is claimed to date.

13th. That the amount of water claimed by appropriation under and by virtue of such (*enlargement or extension*) of such

(*ditch or canal*) is_____cubic feet per second of time. (*That the amount of water claimed by appropriation under and by means of such enlargement of said reservoir, is_____cubic feet.*)

14th. That the number of acres of land lying under and along the line of such (*ditch, canal or reservoir*) as (*enlarged or extended*) and irrigated by water obtained therefrom is_____acres.

Witness my hand and seal this_____day of_____A. D. ____

_____(Seal)

State of Colorado, } ss.
County of_____ }

_____being first duly sworn upon his oath deposes and says that he has read the foregoing statement of claim and that the matters and things set forth in such statement are true of his own knowledege.

_____

Subscribed and sworn to before me this_____day of_____ A. D.____

_____

§ 865. Decretal Order.

State of Colorado, } ss.
County of_____ }

In the District Court of the_____Judicial District of Colorado, in and for the County of_____

In the matter of the Adjudication of the Priorities of Water Rights in Water District No.____

Decree.

Now on this_____day of_____A. D.____this matter coming on for final hearing and adjudication upon the report of_____ referee appointed herein, and to whom this matter was by order of this Court, entered on the_____day of_____A. D.____referred for the purposes in said order mentioned, as well upon the several findings upon the evidence produced in this matter, as upon the evidence taken by and before the said referee, and the Court being satisfied from the several notices, certificates of publication, affidavits, and certificates of said referee, that the said testimony returned, and upon which the findings herein returned have severally been made, was taken upon due and lawful notice, in all respects according to the statute in such case made and provided, and the rules and several orders of this Court in that behalf made and entered and that the notice of the time set for filing exceptions in this matter to said report and findings, and of the time set for final hearing thereof and of this cause have been duly served upon all of the parties entitled to notice under the order of this Court, in that behalf heretofore entered herein in manner and form as by said order required; and further, that all interested in this matter, and entitled to notice in any stage of the proceedings therein, have at all times been duly notified according to law and the orders of this Court, and the report of the said referee, _____, together with the returns of service of notices, affidavits, lists, indices and findings, being found in due form, and the Court now here, having in open Court heard all parties and their attorneys, so far as they desired to be heard, respectively touching the several matters

herein; it is by the Court in consideration of all the premises, hereby ordered, and adjudged and decreed, that the several findings of the said referee as reported to and filed in this Court, be in all things approved and confirmed, and that they be taken, deemed and held in all respects as the findings of the Court in this matter; and is it further upon like consideration by the Court here ordered, adjudged and decreed, in respect to all and singular the said findings of said referee, in respect to each ditch and canal in said findings and lists numbered one (1) to_____ (__) inclusive, as to_____ creek, ditches, canals and reservoirs numbered_____inclusive, as to_____Creek ditches, canals and reservoirs numbered_____ inclusive, as found in the return thereof in a certain book numbered_____and marked "Referee's Findings," and as the same are hereinafter mentioned and designated in separate paragraphs hereof, as hereinafter in said several paragraphs set forth.

This decree shall be taken decreed and held as intending to determine and establish the several priorities of right by appropriation of water from the streams of said Water District No.____ for irrigation, by the several ditches, canals and reservoirs in said District concerning which testimony has been offered in this matter according to the construction, enlargement or extension thereof, with the amount of water held to have been appropriated thereby, It is therefore ordered adjudged and decreed as in and by the findings of said referee as follows: That said ditches, canals and reservoirs be and the same are hereby separately numbered according to the date of their several and respective constructions, and said dates are hereby determined and decreed to be as follows:

As to canals and ditches:

No. 1. The Olson ditch _____April 1st, 1873
No. 2. The Sweeney Ditch_____June 3rd, 1873

And as to reservoirs:

No. 1. The Morrison Reservoir_____ May 15th, 1875

And the several appropriations of water for said ditches and reservoirs, respectively, and their respective enlargements are hereby numbered and declared, with the dates of said appropriations, to be as follows:

No. 1. The Olson Ditch, original construction, ____ April 1st, 1873
No. 2. The Sweeney Ditch, original construction__ June 3rd, 1873

**** **** ****

No. 20. The Sweeney Ditch, first enlargement____July 10th, 1880.
No. 1. The Morrison Reservoir, original construction, May 15, 1875.

And said canals, ditches and reservoirs, respectively, are entitled to said appropriations and priorities on the aforesaid numbers as follows:

No. 1. The Olsen Ditch_____ No. 1.
No. 2. The Sweeney Ditch _____ 2,20.

And the amount of water adjudged to said canals, ditches and reservoirs, respectively, on their respective priorities per second of time is computed as follows, to wit:

No. 1. The Olson Ditch
Priority No. 1__Cubic feet_____ 10.58
No. 2. The Sweeney Ditch
Priority No. 2__Cubic feet_____ 8.75
Priority No. 20__Cubic feet_____ 15.65

Total.....24.40

No. 1. The Morrison Reservoir

Priority No. 1--Cubic feet 28.09

And the entire amount of water taken from said_____River and said_____Creek a tributary thereof, under the priorities established by this decree for canals and ditches is computed at _____cubic feet of water per second of time; and for reservoirs is computed at_____ cubic feet per second of time.

And more particularly in regard to said canals, ditches and reservoirs, respectively, and enlargements, respectively, as follows:

No. One.—THE OLSON DITCH.—That said ditch is entitled to Priority No. 1. The claimants are_____and_____; that it is a ditch used for the irrigation of lands, taking its supply of water from_____River and the headgate is located on the south side of said river, on the____of Sec.____Township____south of Range____ West. And it is hereby adjudged and decreed that there be allowed to flow into said ditch from said river, for the use aforesaid and for the benefit of the parties lawfully entitled thereto, under and by virtue of said appropriation by construction and priority No. 1, so much water as will flow in said ditch, it being_____feet wide on the bottom, _____feet wide at water surface, depth of flow_____inches and grade_____per mile, not to exceed 10.58 cubic feet per second.

No. 2.—THE SWEENEY DITCH.—That said ditch is entitled to Priorities Nos. 2 and 20, and its claimants are_____and_____ That it is used for the irrigation of lands and takes its supply of water from_____creek. The headgate is located on the north side of said creek, on the____of Section____Township____S. of Range ____west; and it is hereby adjudged and decreed that there be allowed to flow into said ditch from said creek, for the use aforesaid, and for the benefit of the parties lawfully entitled thereto, under and by virtue of said appropriation by construction and Priority No. 2, so much water as will flow in said ditch; it being _____feet wide on the bottom, _____feet wide at water surface, _____inches depth of water flow, and_____grade per mile, not to exceed 8.75 cubic feet per second. That there be further allowed to flow in said ditch as aforesaid, under and by virtue of Priority No. 20, so much additional water, for the purposes aforesaid, as will supply the increased flow thereof as enlarged_____feet in width, the other dimensions remaining the same, not to exceed 15.65 cubic feet per second, and the whole amount of water to which said ditch is entitled is computed at 24.40 cubic feet per second.

No. One.—THE MORRISON RESERVOIR.—That said reservoir is entitled to Priority No. 1, and is claimed by_____. That it is used for the storing of water for irrigation purposes, and its supply of water is taken from_____creek. That it is situated on the____of Section____Township____S. of Range____West, and covers a surface of_____acres. That the_____ditch is the feeder of said reservoir. That the headgate of said feeder is located on the south side of said_____creek, and is near the center of Section ____, Township____S. of Range____W. in_____County; and it is hereby adjudged and decreed that there be allowed to flow into said feeder, from said creek, for the use aforesaid, and for the benefit of the party lawfully entitled thereto, under and by virtue of said appropriation by construction and Priority No. 1, so much water

as will flow in said feeder, it being_____feet wide on the bottom, _____feet wide at water surface, depth of water flow_____grade _____per mile, not to exceed 28.09 cubic feet of water per second.

By the Court.

_____
Judge.

Done in open Court this_____day of_____A. D. ____.

§ 865a. Petition to Board of Commissioners to Fix Rates for the Carriage of Water.

State of Colorado, } ss.
County of..._____ }

Before the Board of County Commissioners.

In the matter of the application of_____and_____parties interested in the carriage and delivery of water for various beneficial purposes, by the_____Company.

To the Honorable Board of County Commissioners of____County in the State of Colorado:

Your petitioners respectively represent that they are the owners of the following described tracts and parcels of land lying in said county, to wit:_____

That such lands are farming and orchard lands which were originally arid and on which crops could not be raised without artificial irrigation, but which have been reclaimed and brought under cultivation by means of water which has been carried and delivered to petitioners by the_____Company.

Your petitioners aver that they are wholly dependent on the water carried and delivered to them by said_____Company in irrigating and cultivating their said land, and have no other source from which they can secure water for such purposes, and that they have not ceased to obtain the carriage and delivery of water by such_____Company with the intent to obtain same from any other source of supply.

Your petitioners aver that said_____Company has been charging them for the carriage and delivery of such water at the rate of_____, which rate your petitioners believe and allege to be unreasonable, unjust and exorbitant; and although your petitioners have applied to the officers of said company to have said rate reduced to a reasonable and just sum, yet said company has at all times refused and still refuses to make such reduction.

Your petitioners respectfully aver that a reasonable and just rate of charge for the carriage and delivery of such water would be not over_____which amount your petitioners are now and have been at all times ready and willing to pay to said company.

And petitioners further aver that the canals, ditches and reservoirs of the said_____Company lie in great part within the boundaries of said_____county and the remainder thereof lie in the county of_____in said State of Colorado.

Your petitioners therefore respectfully pray that your Honorable Board will proceed to fix a just and reasonable rate for such company to charge your petitioners and others similarly situated for the carriage and delivery of such water as provided by the law of the State of Colorado in such case made and provided.

_____

State of Colorado, } ss.
County of.....}

_____and_____being duly sworn each for himself and not for the other deposes and says that he has read the foregoing petition, and knows the contents thereof, that he is the same person whose name is subscribed thereto, and that the matters and things stated therein are true of his own knowledge.

Subscribed etc.

§ 865b. Affidavit in Support of Petition for Fixing Rates.

State of Colorado, } ss.
County of.....}

_____being duly sworn upon his oath deposes and says that he is a resident of said county and has been for_____years last past, that he is well acquainted with the lands of _____and_____ as described in the petition of the said _____and_____to which this affidavit is attached and made a part, and also with the ditches canals and reservoirs of the said_____Company, in said counties of_____and_____affiant is also acquainted with the rates of charges for the carriage and delivery of water for irrigation purposes in said couties of_____and_____; Affiant has read the petition herein referred to, and verily believes the matters and things therein set forth and alleged to be true, and that the rate of_____ charged by said company for the carriage and delivery of water as therein stated is unreasonable and unjust to said petitioners.

Subscribed etc.

§ 865c. Order Setting Petition Down for Hearing.

Same caption as §865a.

Now on this_____day of_____A. D.____the same being one of the days of the____A. D.____session of the said Board of County Commissioners, come before said board_____and_____ and present their petition and affidavit thereto attached, representing and showing to the board that the_____Company is charging such petitioners unjust and unreasonable rates for the carriage of water for irrigation purposes to said petitioners; and that said company refuses to reduce such rates to a just and reasonable sum; and the board having examined said petition and affidavits and having heard the testimony offered in regard thereto, find from said petition, affidavits and testimony. that the facts sworn to, show such application to be, and to have been made in good faith, and that there is reasonable ground to believe that unjust rates are, or are about to be charged by said company for the carriage of water for irrigation purposes as aforesaid;

The board doth therefore order that said petition be set for hearing on the_____day of_____A. D.____when all parties interested in said company or the ditches, canals or reservoirs thereof, or in procuring water therethrough, will be heard by the board in regard thereto; to which time this matter is hereby continued.

§ 865*d*. Order Fixing Rates.

Same caption as §865*a*.

Now on this_____day of_____A. D._____, the same being one of the days of the_____A. D._____session of said Board of County Commissioners, come again before said board_____and_____the petitioners herein, together with_____, their attorney; also come the said_____Company by_____its attorney; also come_____and_____persons interested in procuring water for various purposes through and by means of the (*ditch or canal*) of the said_____Company;

And it appearing to the board that the petitioners herein on the_____day of_____A. D._____caused said_____Company to be served with a duly certified copy of the order of this board, setting this matter down for hearing at this time;

And the board having heard and examined all legal testimony offered by all parties interested as aforesaid, as well concerning the original cost and present value of the diverting works, ditches, canals and reservoirs of the said_____Company, and as to the cost of maintenance and operating the same, and as to all other matters and things which might affect the establishing of a reasonable maximum rate of compensation for the carriage of water to be furnished and delivered by said company from its ditches, canals and reservoirs, aforesaid.

And the board having heard the arguments of counsel and being fully advised in the premises, and on consideration thereof and of the petition, affidavits, testimony and arguments aforesaid, together with all the facts and matters, involved in the case, doth find:

That a just and reasonable rate of compensation for water to be hereafter carried and delivered by said_____Company to the petitioners and others obtaining water through and by means of the ditches, canals and reservoirs of said company would be_____

The board doth therefore order that said rate of_____be fixed as a just and reasonable rate of compensation to be charged for the carriage of water, to be hereafter carried and delivered by the said _____Company.

CHAPTER 36.

IDAHO—CONSTITUTIONAL PROVISIONS, STATUTES AND FORMS.

(*a*) *Constitutional Provisions.*

ARTICLE I.

§ 866. (Sec. 14) Private property may be taken for public use enumerating among other uses, reservoirs, canals, ditches, flumes, pipe lines, for irrigation.

ARTICLE XV.

§ 867. (Sec. 1) Declares that the sale, rental or distribution of water is a public use, and subject to the control and regulation of the state.

§ 868. (Sec. 2) Declares the right to compensation for the carriage of water a franchise.

§ 869. (Sec. 3) Declares that the right to appropriate shall never be denied; priority of appropriation shall give the better right; domestic use has preference over all others. Agricultural uses, over manufacturing, and in organized mining districts, mining uses over manufacturing and agricultural.

§ 870. (Sec. 4) The appropriation and use for a certain purpose is deemed a dedication for that purpose.

§ 871. (Sec. 5) Priority among users from same canal is subject to state control.

§ 872. (Sec. 6) Legislature shall provide the manner in which maximum rates to be charged for the use of water may be established.

(*b*) *Statutes.*

POLITICAL CODE 1901, CH. VI, P. 59.

STATE ENGINEER.

§ 873. (153) State engineer appointed by governor, term four years, must have theoretical and practical qualifications. May be removed for cause.

§ 874. (154) Office at capitol.

§ 875. (155) Oath of office.

§ 876. (156) Bond in sum of $30,000.00. Not less than two sureties.

§ 877. (157) General duties as to streams and reservoirs.

§ 878. (158) Plans of dams and dykes must be approved by state engineer.

§ 879. (159) Appeal to the courts may be taken from decision of state engineer.

§ 880. (160) State engineer shall inspect dams and embankments, order repairs, may order water drawn off.

§ 881. (161) Shall inspect dams reported unsafe.

§ 882. (162) Shall give information as to methods of measuring water.

§ 883. (163) Attorney general shall advise upon legal questions.

§ 884. (164) State engineer make biennial report to the governor.

§ 885. (165) Additional duties may be required by the governor.

§ 886. (166) Salary $2,000.00 with actual expenses not to exceed $500.00 per annum.

CAREY ACT.

§ 887. (480) Acceptance of the conditions of the "Carey Act."

§ 888. (481) Arid lands are under control of the state board of land commissioners.

§ 889. (L. '05, p. 131, Sec. 2) Governor president of board.

§ 890. (482 am'd by L. '05, p. 131, Sec. 3) Regular meetings second Wednesday each month. keep records, may adopt rules.

§ 891. (483 am'd by L. '05, p. 131, Sec. 3) Special meetings called by president or a majority of board.

§ 892. (484) Office in capitol building, in charge of secretary, keep maps for public inspection.

§ 893. (485) Persons desiring to construct irrigation works to reclaim land file request for selection of the land, together with proposal to construct such works, with the approval of the state engineer. Other proceedings and requirements specified.

§ 894. (486) Certified check not less than $250.00 must be deposited.

§ 895. (487) Persons making application, shall at same time apply to state engineer for permit to appropriate water for such lands.

§ 896. (488) Applications must be submitted by secretary of board to state engineer, who shall make written report to the board, and state whether or not permit has been granted by him. If he cannot determine from the map and plans as to feasibility of project must cause survey to be made.

§ 897. (489) In case of approval board shall file request for withdrawal of land with local land office. Engineers rejection binding on board.

§ 898. (490) In case of rejection by engineer or board, party has sixty days to file satisfactory proposal. Time may be extended to six months.

§ 899. (491) Upon approval board shall execute a contract with applicant, and require bond not less than 5 per cent. of estimated cost.

§ 900. (492) Work must begin in six months, be completed in not to exceed five years.

§ 901. (493) Failure to comply with contract works forfeiture.

§ 902. (494) No liability attaches to state to pay for works.

§ 903. (495) Upon withdrawal of land and commencement of work board shall publish notice that lands are open to settlement.

§ 904. (496) Applications to enter such lands in tracts not to exceed 160 acres, may be made to board, accompanied by payment of 25 cents per acre, if allowed certificate issue, if not money refunded.

§ 905. (497) Moneys received deposited with state treasurer used to pay expenses of board, balance to reclaim other arid lands.

§ 906. (498 am'd L. '05, p. 96, Sec. 19) Settler shall cultivate and reclaim not less than one-sixteenth part of his land within one year after notice that water can be supplied, one-eighth within two years, within three years make final proof.

§ 907. (499) Patent from board to settler upon receipt of patent from United States.

§ 908. (500) Water rights attach and become appurtenant to land, party furnishing water has first lien on land and water for deferred payments on water. Contract for water right recorded with county clerk.

§ 909. (501) Upon default lien foreclosed and property sold.

§ 910. (502) May be redeemed from sale within nine months.

§ 911. (503) Stranger may redeem—when.

§ 912. (504) Sheriff file certified copy of certificate of sale in office of county clerk, issue deed on failure to redeem.

§ 913. (505) Maps show location of works, and all lands filed upon shall be subject to right of way.

§ 914. (506) Board shall provide suitable rules, records and reports.

§ 915. (507) Employees, collection of fees.

§ 916. (508) Annual report of board—what contain.

§ 917. (509) Suits brought by board in name of the people of the state of Idaho.

OBSTRUCTION AND INJURIES TO HIGHWAYS.

§ 918. (1220) Owners of live stock must repair damage to ditches.

§ 919. (1221) Ditches crossing highways must be large enough to carry all the water, substantial bridge must be built acceptable to road overseer.

§ 920. (1222) Ditch owner fails to build or repair bridge, road overseer do so. Cost is lien on property of owner.

REVENUE.

§ 921. (1312 Subdiv. 12) Irrigating canals, ditches and water rights appurtenant thereto when used exclusively on the land of the owner, exempt from taxation. When water sold or rented, taxed to extent of sale or rental.

CIVIL CODE 1901, CH. CVI.

§ 922. (2579) A cubic foot per second is standard of measurement.

§ 923. (2580) Right to use water acquired by appropriation.

§ 924. (2582) First in time first in right. [The omitted sections of the Idaho numbering have been repealed by subsequent acts.

§ 925. (2586) Water appropriated may be turned into and mingled with water of another stream, in reclaiming, water appropriated by another must not be diminished.

§ 926. (2589) Accrued rights secured, right to cross ditch or canal of another granted.

§ 927. (2591) Domestic use includes water for the household and sufficient for domestic animals kept for use of household. All parties claiming water right, file with the recorder, notice of the amount claimed, location, specific use and date, within six months after this act becomes a law. [L. 1899, p. 381, §12.

§ 928. (2592) Utilizing seepage, waste and spring water.

§ 929. (2596) Owner of canal must have same ready to deliver water by April first of each year.

§ 930. (2597) Owners of canal appoint water master, to measure water from canal into private laterals.

§ 931. (2598) Damage suffered to be recovered for failure to deliver water.

§ 932. (2599) Water must be furnished by carrier upon demand. Carrier not to contract to deliver more water than it has appropriated.

§ 933. (2600) Notice of intention to use water must be given carrier by January first each year. Preference given to those using water previous year, surplus delivered in numerical order of applications filed. "The consumer of water shall be the judge of the amount and the duty of the water required for the irrigation of his land and the annual charges to be made and to be fixed under the further provisions of this chapter, shall hereafter be based upon the quantity of water delivered to consumers, and shall not in any case depend upon the number of acres irrigated by means of such amount of water delivered."

§ 934. (2602) Owner of ditch must prevent waste.

§ 935. (2608) County commissioners fix carriage rates.

§ 936. (2609) Order for hearing on application to fix rates.

§ 937. (2610) Notice of, and proceedings on, the hearing.

§ 938. (2611 Am'd by L. '05, p. 32, §1) Hearing may be adjourned from time to time. Testimony as to cost and present value of canal system taken. Order fixing maximum rate to be entered.

§ 939. (2612) Enumeration of facts to be considered in fixing rates.

§ 940. (2613) Water company file, before first Monday in January each year, with county recorder and state engineer statement showing the condition of the company on December 31st, sworn to by officer of company.

§ 941. (2614) Owner must bridge canal.

§ 942. (2615) Right of way from stream to place of use provided for.

§ 943. (2616) On owner's refusal to grant, right of way condemned.

§ 944. (2617) May dam channel of stream.

§ 945. (2618) Right of way to supply cities and towns with water.

§ 946. (2619) Ditch owner must keep embankments in good repair.

§ 947. (2620) This act does not impair rights acquired prior to its passage, except as to section 2619.

§ 948. (2621) Line of canal or ditch cannot be changed so as to interfere with use by those taking water before the proposed change.

§ 949. (2622) Right of way over state lands may be acquired.

§ 950. (2623) Upon recommendation of state engineer land board may reserve land for reservoirs.

§ 951. (2624) In enlargement of ditch, those who acquired rights under original ditch are prior to those acquired after the enlargement.

§ 952. (2625) All waters flowing in natural channels are property of the state. Right to use water not a property right itself but appurtenant to the land.

IRRIGATION CODE.

Session Laws 1903, p. 223. [Approved March 11, '03.]

§ 953. (Sec. 1) Application to state engineer for permit to construct, enlarge or extend ditch, accompanied by maps.

§ 954. (Sec. 2) State engineer may approve or disapprove, sixty days to correct errors, approval endorsed thereon, requiring construction work to be completed in five years. May fix less time, applicant may appeal to district court. Work commence in sixty days for appropriations less than 25 feet, appropriation of more must file bond with state engineer.

§ 955. (Sec. 3) If one-fifth of construction work not done in two years permit forfeited. Appeal allowed to district court.

§ 956. (Sec. 4) On completion of work notice of submission of proof by registered mail must be given engineer, who publishes same four weeks.

§ 957. (Sec. 5) State engineer inspect works before receiving proof. Issue certificate to appropriator.

§ 958. (Sec. 6) Appeal allowed to the courts within sixty days.

§ 959. (Sec. 7) Beneficial use to be made not more than four years after completion. Proof of use submitted, notice to engineer of submission of proof, publication by engineer, property examined, proof made in writing.

§ 960. (Sec. 8) Licenses confirming the right to use water issued by state engineer after examining evidence, if satisfactory. Specify amount of water and describe land.

§ 961. (Sec. 9, Am'd L. '05, p. 174) License binding on state and *prima facie* evidence of right to use water. Amount of water limited to one second foot for each fifty acres.

§ 962. (Sec. 10) Fees of state engineer.

§ 963. (Sec. 11, Am'd L. '05, p. 27) Failure to apply water to use for which it was appropriated, for five years, is deemed an abandonment. The use may be transferred to other land by application to state engineer.

§ 964. (Sec. 12) The proof of appropriator may be protested by filing sworn protest statement with engineer.

§ 965. (Sec. 13) State divided into three water divisions.

§ 966. (Sec. 14) Water Division No. 1 defined.

§ 967. (Sec. 15) Water Division No. 2 defined.

§ 968. (Sec. 16) Water Division No. 3 defined.

§ 969. (Sec. 17) One water commissioner appointed by governor for each division.

§ 970. (Sec. 18) Term of water commissioners six years. Must possess theoretical knowledge of hydraulics.

§ 971. (Sec. 19, Am'd L. '05, p. 361) Commissioner have direction of water masters subject to state engineer, and is a member of the board of irrigation.

§ 972. (Sec. 20) Compensation of commissioner ten dollars per day for not to exceed 180 days each year.

§ 973. (Sec. 21) Take oath and file bond $5000.

§ 974. (Sec. 22) State board of irrigation to consist of state engineer and the three water commissioners.

§ 975. (Sec. 23) Board divide state into water districts.

§ 975a. (Sec. 24) Commissioner appoint water master for each district in his division term one year, bond $500. Latter to regulate distribution of water among the ditches of his district.

§ 976. (Sec. 25) Water master report to commissioner.

§ 977. (Sec. 26) Distribute water according to priority; waste of water or interference with headgate, prohibited, fine not exceeding $100, water master may arrest.

§ 978. (Sec. 27) Water master not begin work until called upon by two or more ditch owners.

§ 979. (Sec. 28) May employ assistant masters at $3.00 per day.

§ 980. (Sec. 29) Water master receive not exceeding $4.00 per day, charged against land receiving water and collected by the county

§ 981. (Sec. 30) County pay water master by warrant charging same to land of the users of water.

§ 982. (Sec. 31) Headgates and measuring devices must be maintained.

§ 983. (Sec. 32) Water master enforce law, and customs of users tending toward an economical use of the water.

§ 984. (Sec. 33) State engineer examine and measure streams, prepare maps showing ditches and irrigated lands, and indicating by number, adjudicated priorities, permits and licenses.

§ 985. (Sec. 34) When suit filed to adjudicate priorities to take water from natural stream, judge shall request state engineer

to make an examination and report as required by section 33. Expense of examination taxed as costs.

§ 986. Sections 34-36 providing for the commencement of suits to adjudicate priorities from natural stream, by the water commissioner, the service of summons by publication and posting, have been declared unconstitutional. Bear Lake Co. v. Budge,—Ida.—, 75 P. 614 ('04).

§ 987. (Sec. 38) Decree of court.

§ 988. (Sec. 39) County clerk transmit to state engineer transcript of previous allotments, engineer send certified copy to water commissioners.

§ 989. (Sec. 40) Water commissioner arrange and print.

§ 990. (Sec. 41) Rights to divert and use water shall hereafter be acquired and confirmed under the provisions of this act.

IRRIGATION DISTRICTS—"WRIGHT ACT."

Session Laws 1903, p. 150. [Approved March 9, '03.

§ 991. (Sec. 1) Fifty or more holders of title to land, representing one-fourth of area of proposed district, may propose the organization of irrigation district.

§ 992. (Sec. 2) Petition to board of county commissioners—what to contain. State engineer examine and report. Notice of election.

§ 993. (Sec. 3) Election, conduct of. Votes canvassed by county commissioners. Two-thirds necessary to carry.

§ 994. (Sec. 4) Practically same as Sec. 6, Colo. Act, *supra* §521, except election second Tuesday in December, and official bond $5000.

§ 995. (Sec. 5) Same as Colo. Sec. 7, *supra* §522, with addition of clause for registration of voters.

§ 996. (Sec. 6) Practically same as Colo. Sec. 8, *supra* §523, except polls open one hour after sunrise until sunset.

§ 997. (Sec. 7) Voting and counting ballots.

§ 998. (Sec. 8) Certificate of election, return of ballots and tally lists to secretary board of directors, recount may be demanded.

§ 999. (Sec. 9) Same as Colo. Sec. 9, *supra* §524.

§ 1000. (Sec. 10) Practically same as Colo. Sec. 10, *supra* §525.

§ 1001. (Sec. 11) Similar to Colo. Sec. 11, *supra* §526. First meeting on first Tuesday in January, special provision for plans of construction and apportionment of cost.

§ 1002. (Sec. 12) Same as Colo. Sec. 12, *supra* §527, except monthly meetings, power to construct works given.

§ 1003. (Sec. 13) Same as Colo. Sec. 13. *supra* §528, down to the proviso, does not mention taxation.

§ 1004. (Sec. 14) Same as Colo. Sec. 14, *supra* §529, down to the words "judicial notice."

§ 1005. (Sec. 15) Same as Colo. Sec. 15, *supra* §530, with additions providing for surveys, maps, estimates. Interest seven per cent, authorizes board to contract with United States for construction of works under "Reclamation Act."

§ 1006. (Sec. 16) Same as Colo. Sec. 51, *supra* §566.

§ 1007. (Sec. 17) Practically same as Colo. Sec. 52, *supra* §567.

§ 1008. (Sec. 18) Same as Colo. Sec. 53, *supra* §568, with addition of clause providing for new trial.

§ 1009. (Sec. 19) Same as Colo. Sec. 54, *supra* §569.

§ 1010. (Sec. 20) Appeal within thirty days from entry of judgment.

§ 1011. (Sec. 21) Same as Colo. Sec. 16, *supra* §531, except as to publication of notice, and additions relating to assessments in lieu of bonds.

§ 1012. (Sec. 22) Same as Colo. Sec. 17, *supra* §532.

§ 1013. (Sec. 23) Secretary of incorporated district is assessor, prepare assessment list.

§ 1014. (Sec. 24) Board of directors sit to correct assessments.

§ 1015. (Sec. 25) Board may hear complaints and make changes in assessments.

§ 1016. (Sec. 26) Board make levy at regular meeting in October.

§ 1017. (Sec. 27) Assessment lien on property assessed.

§ 1018. (Sec. 28) Treasurer of district collect assessments. All unpaid assessments for preceding year delinquent first Monday in January.

§ 1019. (Sec. 29) Treasurer prepare delinquent list.

§ 1020. (Sec. 30) Collection of delinquent assessments.

§ 1021. (Sec. 31) Redemptions, within one year.

§ 1022. (Sec. 32) Payment of interest coupons. After ten years. When $10,000 in bond fund, advertise for offers to liquidate bonds, and pay to lowest proposers.

§ 1023. (Sec. 33) Same as Colo. Sec. 23, *supra* §538, except advertise thirty days, addition no contract let unless money in treasury to pay same.

§ 1024. (Sec. 34) No warrant paid until allowed by board.

§ 1025. (Sec. 35) Same as Colo. Sec. 25, *supra* §540, down to "Provided." Addition of procedure for levying and collecting such assessment.

§ 1026. (Sec. 36) Same as Colo. Sec. 26, *supra* §541.

§ 1027. (Sec. 37) Board report annually to state engineer.

§ 1028. (Sec. 38) Compensation of board.

§ 1029. (Sec. 39) Officers of district not interested in contracts.

§ 1030. (Sec. 40) Special assessments submitted at special election.

§ 1031. (Sec. 41) Same as Colo. Sec. 28, *supra* §543, addition authorizing issuance of warrants before sale of bonds.

§ 1032. (Sec. 42) Navigation not to be impaired.

§ 1033. (Sec. 43) This act not to repeal other acts relating to irrigation.

§ 1034. (Sec. 44) Same as Colo. Sec. 32, *supra* §547.

§ 1035. (Sec. 45) Same as Colo. Sec. 33, *supra* §548, except as to publication of notice.

§ 1036. (Sec. 46) Practically same as Colo. Sec. 34, *supra* §549.

§ 1037. (Sec. 47) Board may require petitioners to pay such sums as they would have paid had lands been in district at organization.

§ 1038. (Sec. 48) Same as Colo. Sec. 36, *supra* §551, down to "Provided."

§ 1039. (Sec. 49) Protest filed with board, may be considered.

§ 1040. (Sec. 50) If board deem change advisable submit question at special election.

§ 1041. (Sec. 51) Board shall enter an order conforming with result of election.

§ 1042. (Sec. 52) Copy of order of board recorded in recorder's office.

§ 1043. (Sec. 53) Same as Colo. Sec. 38, *supra* §553.

§ 1044. (Sec. 54) Same as Colo. Sec. 39, *supra* §554.

§ 1045. (Sec. 55) Same as Colo. Sec. 40, *supra* §555.

§ 1046. (Sec. 56) Consolidation of districts submitted to voters.

§ 1047. (Sec. 57) Publish annual statement.

§ 1048. (Sec. 58) County commissioner to have access to district books and records.

§ 1049. (Sec. 59, Am'd Sess. L. '05, p. 378) State lands within district not to be assessed. State land board may contract with district.

§ 1050. (Sec. 60) Districts heretofore organized governed by this act.

Exclusion of land when too high to be irrigated from district system. [Laws '05, p. 220, approved March 9, '05.

§ 1051. (Sec. 1) Holders of land may petition board of directors to exclude.

§ 1052. (Sec. 2) Board cause survey. If lands too high to be benefited by the irrigation works of district, must be excluded.

§ 1053. (Sec. 3) If lands can be irrigated, petitioners liable for costs of survey.

§ 1054. (Sec. 4) If boundaries changed copy of order filed in office of county recorder.

(c) *Forms.*

§ 1055. Application for Permit to Appropriate the Public Waters of the State of Idaho.

1. Name of applicant_____ Postoffice address: P. O._____ County_____

I. If applicant is a corporation give: (a) Date and place of incorporation_____ (b) The amount of capital stock_____ (c) The amount paid in_____ (d) The names and addresses of directors_____

II. The financial resources of the applicant are: (a) Cash on hand_____ (b) Treasury stock_____ (c) Bonds to be issued _____ (d) Other resources_____

2. The quantity of water claimed is_____cubic feet per second.

3. Source of water supply_____ County of_____

4. Location of point of diversion_____

5. To be used for:

I. Irrigation and domestic use: (a) Number of acres to be irrigated_____acres (b) In the following legal subdivisions_____ (A list of lands to be irrigated may be appended, as a part of this application.)

II. Mining, power, manufacturing or transportation purposes: (a) To be used for_____ (b) Amount of power to be generated _____horse power. (c) At what point_____ (d) If water is to be returned to any stream_____ (e) If so, name stream and locate point of return_____

6. Estimated cost of works_____

7. Description of works for diversion:

I. Kind of works (reservoir, dam, ditch, flume, pipes or otherwise)_____

II. Dimensions of works: (a) Height of dam_____feet, length of dam at top_____feet, length of dam at bottom_____feet, material used in construction (wood, earth, stone or concrete) _____(b) Capacity of reservoir_____acre-feet. (c) Size of headgate, width_____feet, height_____feet. (d) Ditch (flume or pipe) width at bottom_____feet, width at water line_____feet, depth of water_____feet. Average grade per mile is_____feet. Length of ditch is_____miles, and it crosses the following quarter sections_____to_____which is the point of intended use.

8. Time required for the completion of the construction of such work is_____years. (Time must in no case exceed five years after date of approval of application.)

9. Time required for the complete application of the water to the proposed use is_____additional years. (The time must in no case exceed four years after the date set for the completion of works as defined in Section 8.) Remarks:_____

Approval of State Engineer.

The number of this permit is_____ Date of first receipt of application_____190__ Returned to applicant for correction____ 190__ Corrected application received_____190__ Recorded in Book_____Page_____ Approved_____190__

This is to certify that I have examined the within application for a permit to appropriate the public waters of the State of Idaho and hereby grant the same, subject to the following limitations and conditions:

Good and sufficient bond to be filed in the sum of $_____on or before_____190__.

Work to begin on or before_____190__, and to continue diligently and uninterruptedly to completion, unless temporarily interrupted by circumstances over which permit holder has no control.

One-fifth of the work above specified to be completed on or before_____.

The whole of said work to be completed on or before_____.

The time for the proof of beneficial use of water appropriated in accordance herewith, to extend to_____.

Witness my hand this_____day of_____190__.

_____
State Engineer.

§ 1056. Notice of Proof of Completion of Works.

(This blank must be filled out by holder of permit and forwarded by registered mail to the State Engineer at least 60 days before the time set for completion of works.)

(P. O.) _____
(Date)_____

TO THE STATE ENGINEER OF THE STATE OF IDAHO,
BOISE, IDAHO:

DEAR SIR: Notice is hereby given that at_____M. on the _____day of_____190__, at_____County of_____State of Idaho, before_____proof will be submitted of the completion of works for the diversion of_____cubic feet per second of the waters of_____in accordance with the terms and conditions of a certain permit heretofore issued by the State Engineer of the State of Idaho.

1. The name of the person or corporation holding said permit is_____.

2. The postoffice address of such person or the place of business of such corporation is_____County of_____State of Idaho.

3. The number of such permit is_____, and the date set for the completion of such work is_____.

4. Said water to be used for_____purposes.

5. Said works of diversion will be fully completed on the date set for such completion, and the amount of water which said works are capable of conducting to the place of intended use, in accordance with the plans accompanying the application for such permit, is_____cubic feet per second.

6. The amount of lands for which said water is available is _____acres, particularly described as follows:_____.

(In case of all canals or other works designed to divert and carry more than 50 cubic feet of water per second, the following certificate must be signed by a well known and competent engineer.)

I hereby certify that the facts set forth in the above notice are true.

_____
Engineer.

_____desire__that the above notice be published, according to law, in the_____of_____published in the county in which said works are situated; the expense of which publication will be borne by_____ (Signature) _____

§ 1056a. Notice of Publication.

Notice is hereby given that at_____M., on the_____day____ 190__, at_____County of_____State of Idaho, before_____proof will be submitted of the completion of works for the diversion of _____cubic feet per second of the waters of_____in accordance with the terms and conditions of a certain permit heretofore issued by the State Engineer of the State of Idaho.

1. The name of the person or corporation holding said permit is_____

2. The postoffice address of such person or the place of business of such corporation is_____County of_____State of Idaho.

3. The number of such permit is_____, and the date set for the completion of such work is_____

4. Said water to be used for_____purposes.

5. Said works of diversion will be fully completed on the date set for such completion, and the amount of water which said works are capable of conducting to the place of intended use, in accordance with the plans accompanying the application for such permit, is_____cubic feet per second.

6. The amount of lands for which said water is available is____ acres, particularly described as follows:_____

_____

State Engineer.

§ 1057. Proof of Completion of Works.

Deposition of Holder.

Question 1.—State your name, age, residence, occupation and postoffice address. Answer. _____

Ques. 2.—If acting in behalf of a corporation, state its name, principal place of business, your position with reference to same, and your authority for appearing in its behalf. Ans. _____

Ques. 3.—State number and date of permit, amount of water you are authorized to divert, source, and point of diversion. Ans. _____

Ques. 4.—State purpose for which water is to be used, and, if for irrigation, state the number of acres and give description of the land you intend to reclaim. Ans. _____

Ques. 5.—State whether or not the water has been turned into your works of diversion, and, if so, when and to what extent. Ans. _____

Ques. 6.—State whether or not the works of diversion are fully completed, and whether or not they comply in all respects with the terms of the permit. Ans. _____

Ques. 7.—If the works of diversion do not comply with all the terms of your permit, state fully those particulars in which there is any variance. Ans. _____

Ques. 8.—Give description of works, state dimensions and capacity of each part, and give cost of same. Ans. _____

(Sign here)_____

I hereby certify that the foregoing testimony was read to the above subscriber before its signing, that I believe him to be the person he represents himself to be, and that said testimony was subscribed and sworn to before me, at my office in_____, County of_____, State of Idaho, on this_____, day of_____A. D. 190__

_____

§ 1058. Proof of Completion of Works.

Deposition of Witness.

Ques. 1.—State your name, age, residence, occupation and postoffice address. Ans. _____

Ques. 2.—Are you acquainted with_____, the holder of Permit No.__, authorizing the diversion of_____second-feet of the waters of_____at_____for_____purposes? How long have you know him, and where does he reside? Ans. _____

Ques. 3.—Have you read or heard read said Permit No. __, and are you familiar with its terms and conditions? Ans. _____

Ques. 4—(If for irrigation purposes.) Are you acquainted with the land proposed to be irrigated under said permit? If so, describe same, state its character, and give your estimate of the amount of water required for its profitable cultivation. Ans. ____

Ques. 5.—Are the works of diversion fully completed and of sufficient capacity to convey the entire amount of water set out in the permit from point of diversion to place of use? Ans. _____

Ques. 6.—Describe the works of diversion as they now exist, and give your estimate of their capacity. Ans. _____

(Sign here)_____

I hereby certify that the foregong testimony was read to the above subscriber before its signing, that I believe him to be the person he represents himself to be, and that said testimony was subscribed and sworn to before me, at my office in_____, County of_____, State of Idaho, on this_____day of_____A. D. 190__

_____

§ 1059. Certificate of Completion of Works.

To All Whom It May Concern:

This is to certify that_____of_____, County of_____, and State of_____, the holder__ of Permit No.__, issued upon Application No.__, bearing date of priority of_____, authorizing the diversion of_____second-feet of the waters of_____, County of_____, State of Idaho, at_____, for_____purposes, ha__ fully complied with the provisions of the laws of the State of Idaho relating to the proof of completion of the works of diversion set out and described in said Permit; that said works are adequate for diverting and conveying to the place of intended use_____second-feet of water; and that the lands proposed to be irrigated by the use of said water are described as follows, to wit:_____

Witness my hand this_____day of_____A. D. 190__

_____

State Engineer of the State of Idaho.

§ 1060. Notice of Proof of Application of Water to Beneficial Use.

(This blank must be filled out by holder of permit and forwarded to the State Engineer at least 60 days before the time set for application of water.)

(P. O.)_____

(Date)_____

TO THE STATE ENGINEER OF THE STATE OF IDAHO, BOISE, IDAHO:

DEAR SIR: Notice is hereby given that at_____M. on the

_____day of_____190__, at_____County of_____State of Idaho, before_____proof will be submitted of the application to beneficial use of_____cubic feet per second of the waters of_____ in accordance with the terms and conditions of Permit No.__ heretofore issued by the State Engineer of the State of Idaho.

1. The name and postoffice address of the person or corporation holding said permit are_____

2. The use to which said water has been applied is_____

3. The amount applied to beneficial use is_____

4. The place where said water is used is (if for irrigation, give full and accurate description of the lands irrigated)_____

5. The name of the canal or ditch or other works by which said water is conducted to such place of use is_____

6. The right to take the water from such works is based upon Permit No.__

7. The source of supply from which such water is diverted is___

8. The date of the priority which said user is prepared to establish is_____

I desire that the above notice be published, according to law, in the_____of_____, published in the county in which said water is to be used; the expense of which publication will be borne by me.

(Sign)_____

§ 1061. Notice of Proof of Application of Water to Beneficial Use.

Notice is hereby given that at_____M. on the_____day of____ 190,__ at_____County of_____State of Idaho, before_____proof will be submitted of the application to beneficial use of_____cubic feet per second of the waters of_____in accordance with the terms and conditions of Permit No.__ heretofore issued by the State Engineer of the State of Idaho.

1. The name and postoffice address of the person or corporation holding said permit are_____

2. The use to which said water has been applied is_____

3. The amount applied to beneficial use is_____

4. The place where said water is used is (if for irrigation, give full and accurate description of the lands irrigated)_____

5. The name of the canal or ditch or other works by which said water is conducted to such place of use is_____

6. The right to take the water from such works is based upon Permit No.__

7. The source of supply from which such water is diverted is___

8. The date of the priority which said user is prepared to establish is_____

_____
State Engineer.

§ 1061*a*. Proof of Application of Water to Beneficial Use.

Deposition of Holder.

Ques. 1. State your name, age, residence, occupation and postoffice address. Ans. _____

Ques. 2. If acting in behalf of a corporation, state its name, principal place of business (if a foreign corporation, give name and postoffice of statutory agent), your position with reference to same, and your authority for appearing in its behalf. Ans. _____

Ques. 3. State number and date of permit, and date of priority you propose to establish under the permit. Ans. ------

Ques. 4. State source of water supply and give exact location of point of diversion. Ans. ------

Ques. 5. Describe your works of diversion, and state amount of water they are capable of conveying from point of diversion to place of use, and give name of canal or ditch or other works by which water is conducted to such place of use. Ans. ------

Ques. 6. State for what purpose water is used and describe place of use. (If for irrigation, name each subdivision in which used, and number of acres in each subdivision that have ACTUALLY been irrigated with said water.) Ans. ------

Ques. 7. If for other than irrigation purpose, state how applied, amount of horse power generated, etc. Ans. ------

Ques. 8. What is the minimum amount of water required for the use specified above? Ans. ------

Ques. 9. If you are not the person or representative of the corporation to whom above mentioned permit was originally issued, please state how ownership was acquired by present holder. Ans.---

Ques. 10. State when, how, in what amount and to what extent the water diverted under above mentioned permit has been used. Ans. ------

(Sign)----------

I hereby certify that the foregoing testimony was read to the above subscriber before its signing, that I believe him to be the person he represents himself to be, and that said testimony was subscribed and sworn to before me, at my office in------, County of------, State of Idaho, on this------day of------A. D. 190--

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§ 1061b. Proof of Application of Water to Beneficial Use.

Deposition of Witness.

Question 1. State your name, age, residence, occupation and office address. Answer. ------

Ques. 2. Are you acquainted with------the holder of Permit No.--? How long have you known him, and where does he reside? Ans. ------

Ques. 3. Have you read or heard read said Permit No.--, and are you familiar with its provisions and conditions? Ans. ------

Ques. 4. State source of water supply, place of diversion, and describe works for conveying water from point of diversion to place of use. Ans. ------

Ques. 5. How many second-feet of water do you estimate said works will safely conduct to place of use, and how much water have you seen being so conveyed? Ans. ------

Ques. 6. State for what purpose water is used and at what place. (If for irrigation, give each subdivision in which water has been used and number of acres irrigated in each subdivision.) Ans. ------

Ques. 7. If for power or other purposes than irrigation, state how water has been applied and to what extent. Ans. ------

Ques. 8. (If for irrigation) State character of land that has been reclaimed, and give your estimate of the amount of water required for its profitable cultivation. Ans. ------

Ques. 9. Have you any interest in the works, water or lands above mentioned? If so, in what way and to what extent? Ans. ------

Ques. 10. State when, how, in what amount and to what extent you have witnessed the application to beneficial use of the water diverted under said permit. Ans. ------

(Sign)----------

I hereby certify that the foregoing testimony was read to the above subscriber before its signing, that I believe him to be the person he represents himself to be, and that said testimony was subscribed and sworn to before me, at my office in-----, County of------State of Idaho, on this------day of------, A. D. 190--

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§ 1061c. State of Idaho.

Water License No.----

WHEREAS, On the------day of------A. D. 190--, of------ County of------and State of------duly made application (No. ----) to me for a permit to use------cubic feet per second of the waters of------County of------State of Idaho, for------purposes; and

WHEREAS, On the------day of------A. D. 190--, Permit No.-- was issued to said applicant-- for the diversion of said water and providing for the completion of the works of diversion therein described on or before the------day of------A. D. 190-- and for the application to beneficial use of said water on or before the---- day of------A. D. 190-- and,

WHEREAS, On the-----day of-----A. D. 190-- the holder-- of said permit duly made proof of the completion of adequate works for the diversion of------cubic feet per second of said waters, as evidenced by my certificate No.----dated------confirming the completion of works of sufficient capacity for diverting and conveying to the place of intended use------cubic feet per second of water, with date of priority of------and,

WHEREAS, On the------day of------A. D. 190-- proof was duly made of the application to beneficial use of------cubic feet per second of said water;------

NOW, THEREFORE, By virtue of the authority vested in me by the laws of the State of Idaho, I hereby grant and confirm to ------of------the holder-- and owner-- of said Permit No.-- a perpetual right, dating from------to the use of------cubic feet per second of the waters of------in the County of------and State of Idaho, or so much thereof as may be necessary for the purposes hereinbelow mentioned, to be diverted at------and conducted to and upon------for the purpose--of------subject, however, to the laws of the State of Idaho applicable to a license for the use of the waters of the State, and subject, also, to the local or community customs, rules and regulations which have been or may be adopted from time to time by a majority of the users from a common source of supply, canal or lateral from which such water may be taken, when such rules and regulations have for their object the economical use of such water.

WITNESS, My hand and the seal of my office at Boise, Idaho, this------day of------A. D. Nineteen Hundred and----

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State Engineer.

CHAPTER 37.

KANSAS—CONSTITUTIONAL PROVISIONS, STATUTES AND FORMS.

(a) *Constitutional Provisions.*

§ 1061*d*. Kansas has no constitutional provisions relating to irrigation.

(b) *Statutes.*

General Statutes 1905, ch. 23, "Corporations"—Appropriation of Lands for Use of.

§ 1062. (1426) Land may be condemned for purposes contemplating the use of water for irrigation and power.

§ 1063. (1427) May lease or sell * * * water.

§ 1064. (1428) Ditch companies may cause surveys to be made, take and hold voluntary grants, take land sufficient for canal purposes, furnish water for irrigation at rates fixed by its by-laws, borrow money, issue bonds. Damages to be assessed and paid for as in case of railroads.

General Statutes 1905, ch. 52b, "Irrigation Laws."

§ 1065. (3787) Lien on crop for contract price of water furnished.

§ 1066. 3788) Injuring canal, fine or imprisonment.

§ 1067. (3789) Right to use water may be acquired by appropriation. "First in time is the first in right."

§ 1068. (3790) May change place of diversion.

§ 1069. (3791) Must post notice at place of diversion, within ten days thereafter post copy in county clerk's office, and record copy in same office.

§ 1070. (3792) Work commence within 60 days after posting notice. Prosecute diligently.

§ 1071. (3793) County clerk record copies of notice.

§ 1072. (3794) Ditch constructed across land with knowledge or consent of owner deemed rightfully located.

§ 1073. (3795) Ditch constructed and maintained for five years across vacant land without objection acquires right of way.

§ 1074. (3796) Damages, measure of.

§ 1075. (3797) Right to take water by ditch company may be obtained by condemnation as follows:

§ 1076. (3798) Petition to district judge, appoint three freeholders as commissioners.

§ 1077. (3799) Commissioners publish notice of time and place where they will hear claims for damages.

§ 1078. (3800) Shall hear claims and allow damages.

§ 1079. (3801) Report to clerk of district court.

§ 1080. (3802) Report to be filed in 20 days after hearing. Time may be extended.

§ 1081. (3803) May appeal from decision of commissioners to district court.

§ 1082. (3804) Damages only question on appeal.

§ 1083. (3805) Where no appeal, damages must be paid in 60 days.

§ 1084. (3806) Payment of damages right becomes absolute.

§ 1085. (3807) Natural waters west 99th meridian devoted 1st to irrigation, 2nd other industrial purposes.

§ 1086. (3808) Appropriation secures only such quantity as applied to beneficial use within reasonable time.

§ 1087. (3809) Water may be turned into and withdrawn from natural channels.

§ 1088. (3810) Ditch may be extended, where change in natural channel makes it necessary.

§ 1089. (3811) Subterranean waters may be appropriated.

§ 1090. (3812) Subterranean water that discharges into surface stream not taken to prejudice of prior appropriator from surface stream.

§ 1091. (3813) Who deemed to have appropriated.

§ 1092. (3814) Failure to continuously use without sufficient cause, deemed an abandonment.

§ 1093. (3815) Vested rights subject to condemnation.

§ 1094. (3816) Lease or purchase of water confers right to continue at rate fixed by county commissioners.

§ 1095. (3817) Water taken from ditches for domestic use, when.

§ 1096. (3818) In taking such domestic water must do no injury.

§ 1097. (3819) Water may be stored for future use.

§ 1098. (3820) Any person transferring, selling, leasing, assigning or bargaining with reference to the transfer, sale, lease or assignment of any water, or any right he may have acquired to the use thereof, and any person receiving any money or other valuable thing whatsoever in consideration of the prorating or rotating of water, or in consideration of his agreement to prorate or rotate the water, shall be deemed and taken to have abandoned all right to the use and enjoyment of such water; Provided, however, Such abandonment shall not operate to the prejudice of the rights of any incumbrancer or equitable owner of the lands, mill, manufactory or other works to which such water is appurtenant.

§ 1099. (3821) Right to use water is subject to right of eminent domain.

§ 1100. (3822) Right of way for ditch and site. Only one ditch across same tract.

§ 1101 (3823) Condemn right of way, damages.

§ 1102. (3824) Having water power the owner may condemn site for mill or factory.

§ 1103. (3825) Damages for ditches constructed through cities or towns.

§ 1104. (3826) Failure to use right of way for 2 years deemed an abandonment thereof.

§ 1105. (3827) Ditches to be kept in good repair, damages.

§ 1106. (3828) Carrier have ditch cleaned and repaired by April 1st and kept as full as possible until October 1st.

§ 1107. (3829) Appropriator construct headgate and rating flume.

§ 1108. (3830) Waste or sand gate may be used instead of headgate.

§ 1109. (3831) Appropriator construct waste gate and tail race, to conduct water to some natural channel to prevent injury to lands of others. Appropriator next in priority may use such waste water.

§ 1110. (3832) Appropriator may have water carried through the diverting works of another upon payment of agreed price.

§ 1111. (3833) Proprietor of irrigating works shall construct outlets and gates for delivery of water to persons entitled to its use. Multiplicity of outlets avoided. Location of outlets under control of superintendent of works.

§ 1112. (3834) Superintendent of works to measure water to those entitled to its use. In times of scarcity, water to be apportioned ratably. Consumers under a lateral may elect superintendent of lateral, manner of election prescribed.

§ 1113. (3835) Water to be distributed according to priority of appropriation and headgates of subsequent appropriators to be shut down until prior appropriators supplied.

§ 1114. (3836) Persons boring artesian well to keep detailed record, and file in office of register of deeds for county in which well is situated.

§ 1115. (3837) Proprietor of well heretofore bored, file statement with register of deeds.

§ 1116. (3838) Such statement may be recorded in other counties and shall be notice of appropriation by such well.

§ 1117. (3839) Wells shall be properly cased.

§ 1118. (3840) Artesian well water not to be wasted.

§ 1119. (3841) Dams holding depth of water more than 10 feet must be constructed according to plans of reputable engineer, who shall file bond with county commissioners.

§ 1120. (3842) Provides how such dam shall be constructed.

§ 1121. (3843) Provides measurements of cross-sections of such dam.

§ 1122. (3844) Inner face of dam to be faced with stone or timber.

§ 1123. (3845) No water allowed to flow over dam, suitable outlets to be provided.

§ 1124. (3846) Prior statutes not to apply. Private property not to be occupied or injured without condemnation and compensation.

§ 1125. (3847) Where dam may be used as a highway across valley, township may aid in construction.

§ 1126. (3848) Parties entitled to water from any diverting or storage works may agree in writing that water may be rotated.

§ 1127. (3849) Any number less than all consumers may agree to rotate as between themselves.

§ 1128. (3850) Proprietors of two or more diverting systems from same source may agree to rotate.

§ 1129. (3851) Agreement between consumers to be delivered to superintendent, who shall enforce same.

§ 1130. (3852) Agreement between diverting systems, to rotate, not to be effective, if injurious to others.

§ 1131. (3853) Proprietor of other works may bring action in district court to annul such agreement.

§ 1132. (3854) Such agreements not to affect rights of prior encumbrancers, nor the priority rights of the parties to the agreement.

§ 1133. (3855) Agreement between owners of diverting works when for more than one season, shall be recorded in office of register of deeds.

§ 1134. (3856) Proprietor of fence across or abutting on stream maintain gate through which proprietors of diverting works may pass.

§ 1135. (3857) Proprietor of irrigation works maintain bridges.

§ 1136. (3858) Owner of land through which ditch or canal passes may construct bridge across same.

§ 1137. (3859) Owner of land affected by seepage may drain.

§ 1138. (3860) May lay pipes or conduits across lands of others to drain.

§ 1139. (3861) Board of railway commissioners may when petitioned fix rates of compensation for use of water to be charged by irrigation company.

§ 1140. (3862) This board have same powers respecting irrigation companies, as they have regarding railroad companies.

§ 1141. (3863) Board of county commissioners may cause organization of irrigation districts.

§ 1142. (3864) Three-fifths resident land owners may petition to county commissioners asking an election to vote on proposed irrigation district.

§ 1143. (3865) County commissioners hear petition call election within sixty days.

§ 1144. (3866) Notices of election posted five public places ten days before election. Three judges and two clerks for each election precinct to be designated.

§ 1145. (3867) Election conducted same as general elections.

§ 1146. (3868) County commissioners canvass returns. If three-fifths of votes in favor, they shall make an order creating the district. Nothing in act construed as grant of power to district to acquire except by purchase irrigation works belonging to others.

§ 1147. (3869) Officers are board of irrigation commissioners consisting of a president, secretary and treasurer, elected for one year. County commissioners appoint first board.

§ 1148. (3870) Board of irrigation commissioners divide district into election precincts.

§ 1149. (3871) District may issue bonds. Total amount not to exceed $10 per acre. Bonds payable not less than five nor more than thirty years. Interest not to exceed six per cent. Levy tax to pay interest and create sinking fund.

§ 1150. (3872) If people of district desire issue of bonds petition county commissioners asking submission of question to voters.

§ 1151. (3873) Petition specify amount of bonds, term to run, signed by three-fifths resident land owners. File with county clerk, who notify commissioners who meet within ten days, make order calling election.

§ 1152. (3874) Election held in 40 days. Notice published in official county paper three weeks and posted five public places.

§ 1153. (3875) If three-fifths vote in favor county commissioners order issue. Bonds signed by president and secretary of district countersigned by chairman county commissioners and county clerk, attested with county seal.

§ 1154. (3876) Bonds placed with county treasurer and by him sold for not less than par.

§ 1155. (3877) When funds from bonds in hand, board may submit question of purchase of works. If vote favorable, vendor of works convey to district with an unqualified warranty.

§ 1156. (3878) If works are to be constructed, board advertise for bids.

§ 1157. (3879) Contractor give bond. Twenty per cent of construction price to be retained until board satisfied with work.

§ 1158. (3880) Works under control of board. It shall make rules for operation and distribution of water, fix rates to be charged for water, subject to right county commissioners to fix rate. Money from sale of water paid to district treasurer.

§ 1159. (3881) Treasurer report quarterly.

§ 1160. (3882) Money paid out on order of president countersigned by secretary.

§ 1161. (3883) If funds not sufficient to pay interest and expenses, board may levy tax.

§ 1162. (3884) Board may extend ditch into adjoining counties to obtain water.

§ 1163. (3885) Board receive $3 per day and expenses not to exceed $100 per annum. President and secretary give $1000 bond. Treasurer's bond fixed by county commissioners.

§ 1164. (3886) Board may appoint superintendent, salary not to exceed $1000 per annum.

§ 1165. (3887) Owner of irrigation works prohibited from charging royalty or bonus. Money so charged held corrupt rate, may be recovered.

§ 1166. (3888) Demanding royalty or bonus misdemeanor.

§ 1167. (3889) Having water, refusal to furnish, misdemeanor.

§ 1168. (3890) Proprietors of works select superintendent upon whom process and notices may be served. File name and address with clerk of district court.

§ 1169. (3891) Superintendent refusing or neglecting to deliver water, fined or imprisoned. Owners of works also liable in damages.

§ 1170. (3892) Wasting water fined $5 to $300.

§ 1171. (3893) Unlawful acts. Interfere with, head, outlet, or lateral gates, cut or break embankment, to take water, to interfere with officer. First offense fine $50 to $300 or imprisoned not to exceed 90 days.

§ 1172. (3894) Second offense fine $20 to $1000 or imprisonment in penitentiary one year.

§ 1173. (3895) *Prima facie* evidence of unlawful diversion.

§ 1174. (3896) Officers of county may investigate waste of artesian water to secure evidence for prosecution.

§ 1175. (3897) Failure to keep, or keeping false record of boring of artesian well or refusal to let officers investigate, misdemeanor.

§ 1176. (3898) Failure to construct rating flume, water shut out of ditch till constructed.

§ 1177. (3899) Failure to build headgate, misdemeanor.

§ 1178. (3900) Failure to build headgate, officers may exclude water from ditch by cutting banks, or filling head, cost thereof to be lien on ditch, enforceable by sale of ditch.

§ 1179. (3901) Dams or embankments may be inspected and abated when public safety require.

§ 1180. (3902) Damaging or putting property of others in jeopardy by dam or embankment not constructed according to law, liable for all damages and may be fined and imprisoned. If loss of life occur, persons offending liable to criminal prosecution for maliciously, wilfully or negligently causing such death.

§ 1181. (3903) Person fearing injury from such dam, may file with county attorney, a complaint.

§ 1182. (3904) Trial of such cause in district court.

§ 1183. (3905) Structure may be abated.

§ 1184 (3906) Costs.

§ 1185. (3907) District courts have jurisdiction for settlement of priorities of rights to take water from natural stream. Court may appoint water bailiff to distribute water, compensation $2.00 per day.

§ 1186. (3908) Perjury punished.

§ 1187. (3909) Officer not liable to civil action. Exception.

§ 1188. (3910) Duties of county clerk prescribed.

§ 1189. (3911) Irrigation districts extending into two or more counties, procedure.

§ 1190. (3912) County commissioners of county in which larger part of district is located, act in all matters.

§ 1191. (3913) Maps to be filed with petition what to contain.

§ 1192. (3914) Election to issue bonds for, and question of purchase of works already constructed, submitted at same election.

§ 1193. (3915) Bonds of districts in two or more counties registered in each county.

§ 1194. (3916) When district in two or more counties, name of each county appear in name of district.

§ 1195. (3917) County clerk where larger portion of district is located certify to county clerks of other counties copy of plat and order of county commissioners.

§ 1196. (3918) Law of 1891 and amendments are applicable.

§ 1197. (3919) Board of Irrigation, Survey and Experiment created. Five members, geologist of state university, president of agricultural college and three appointed by governor, who shall be versed in practical irrigation; who shall be active members.

§ 1198. (3920) Active members take oath, give $5000 bond. Select president and secretary. President known as state engineer of irrigation.

§ 1199. (3921) Meet at Topeka and such other places as designated. Notice of meetings by publication.

§ 1200. (3922) Surveys and records under direction of board.

§ 1201. (3923) Board to sink experimental wells, test underflow, measure water in streams, estimate cost per acre for water supply.

§ 1202. (3924) Board prepare drainage map.

§ 1203. (3925) Board make observations, rainfall, temperature, evaporation and percolation.

§ 1204. (3926) Board may bore for artesian water, keep record of borings.

§ 1205. (3927) Board keep data of strata passed through in boring.

§ 1206. (3928) Copies of surveys, maps, etc., to be deposited with state university, state agricultural college and board.

§ 1207. (3929) Board locate observation stations and wells on school lands if possible. May receive donations of not less than 40-acre tracts for such purposes.

§ 1208. (3930) Board advertise for bids on wells, and constructing stations. Contractor furnish bond, twenty per cent of price retained until work approved.

§ 1209. (3931) Board report to legislature.

§ 1210. (3932) Active members receive $1000 per year and expenses.

§ 1211. (3933) Board make payment by sworn vouchers drawn on state treasurer.

§ 1212. (3934) Board lease stations and wells.

§ 1213. (3935) Appropriates $30,000 for use of board.

§ 1213*a*. (3936) Repeal.

§ 1214. (3937) Irrigation companies may condemn land.

Taxation Ch. 107.

§ 1215. (8318) Provides for taxation of all property of irrigation systems. No exceptions.

§ 1216. (8319) Value of flumes, ditches, etc., to be deducted from value of stock, of company in assessing.

(*c*) *Forms.*

§§ 1217-18. Kansas has no official forms.

CHAPTER 38.

MONTANA—CONSTITUTIONAL PROVISIONS, STATUTES AND FORMS.

(*a*) *Constitutional Provisions.*

§ 1219. Public Use in Waters and Reservoir Sites.

The use of all water now appropriated, or that may hereafter be appropriated for sale, rental, distribution or other beneficial use, and the right of way over the lands of others for all ditches, drains, flumes, canals and aqueducts, necessarily used in connection therewith, as well as the sites for reservoirs necessary for collecting and storing the same shall be held to be a public use. [Art. 2, §15.

§ 1220. Re-classifying Lands.

* * * Lands may be re-classified whenever by reason of increased facilities for irrigation or otherwise, they shall be subject to different classification. [Art. 17, §1.

(*b*) *Statutes,*

CIVIL CODE, 1895, TITLE VIII, WATER RIGHTS.

§ 1221. (1880) The right to use unappropriated water may be acquired by appropriation.

§ 1222. (1881) Appropriation must be for some beneficial purpose. When appropriator abandons or ceases to use water for such purpose, right ceases. Abandonment question of fact.

§ 1223. (1882) May change place of diversion, and use and manner of use.

§ 1224. (1883) Appropriated water may be carried in channel of another natural stream.

§ 1225. (1884) Appropriator required to turn surplus of water over his needs, back into stream—penalty.

§ 1226. (1885) "First in time, first in right."

§ 1227. (1886) Notice of appropriation posted at place of diversion, contents. File verified copy with some additions, in office of county clerk, within 20 days after posting.

§ 1228. (1887) Work to commence within 40 days after posting.

§ 1229. (1888) Failure to comply, deprives of right against subsequent appropriator. By compliance, date of appropriation relates to date of posting.

§ 1230. (1889) Owners of rights heretofore acquired shall within six months file declaration with county clerk. Failure to comply does not work forfeiture.

§ 1231. (1890) Records provided for by §§1886, 1889, *prima facie* evidence in all courts.

§ 1232. (1891) In any action for protection of rights all persons diverting water from the same source may be made parties, and court in one judgment may settle all the rights. Damages may be ascertained and allowed in such action

§ 1233. (1892) County clerk keep book for declaration or notices.

§ 1234. (1893 repealed by Laws '99, p. 126) New act provides that the cubic foot per second shall be standard of measurement; 100 miners' inches equivalent to two and a half cubic feet per second, not to affect measurement heretofore decreed by court.

§ 1235. (1894) Right to conduct water across land gives right to raise it to sufficient height by dams. Crossing railroad right of way, give 30 days' notice of intention

§ 1236. (1895) Ditch crossing roads must be kept in good repair and bridged.

§ 1237. (1896) Failure to do so—fine.

§ 1238. (1897) Appropriator having surplus of water, upon tender of usual price per inch, must deliver the quantity called for by such tender.

§ 1239. (1898) Person desiring such surplus must dig ditches necessary to convey same.

§ 1240. (1899) Right to receive such surplus may be enforced. Damages for failure to deliver.

§ 1241. (1900) Person paying for such surplus cannot sell or dispose of same after being used by him.

§ 1242. (1901) Not to fill reservoir until substantially constructed.

§ 1243. (1902) Dams to be constructed substantially.

§ 1244. (1903 Am'd L. 1905, p. 190) Notice of survey of ditch, affidavit of surveyor, record of same, *prima facie* evidence.

§ 1245. (1904 Am'd L. 1905, p. 190) Decrees in adjudications of rights of priority to take water from natural stream *prima facie* evidence.

An Act providing for water commissioners. [Sess. L. 1905, p. 145. Approved March 2, 1905.

§ 1246. (Sec. 1) Whenever priority rights of a stream have been adjudicated district judge on petition of owners of twenty-five per cent of water rights, to appoint commissioner to distribute water according to decree. Commissioner has powers of constable or sheriff to arrest for interference. Owners of fifty-one per cent of water rights in any ditch or single water system affected by such decree may petition for and obtain appointment of commissioner to distribute waters of ditch or system.

§ 1247. (Sec. 2) Term of appointment of commissioner specified in order, may be changed by judge.

§ 1248. (Sec. 3) Commissioner to take oath of office.

§ 1249. (Sec. 4) Any person dissatisfied with distribution by commissioner may file complaint. Judge fix time for hearing cause, notice to be given necessary parties, hear evidence and make necessary orders. If acts of commissioner are a willful disobedience of decree he may be adjudged guilty of contempt.

§ 1250. (Sec. 5) Water commissioner keep record and file report of amount of water delivered "to each user." Judge make order apportioning fees and compensation allowed commissioner, charging same proportionately to the persons using water. Report show amount expended in repair of headgates, etc., which is assessed to parties for whom repaired. Amount to be paid by each user, to be fixed by order. Parties interested have notice of report and may object.

§ 1251. (Sec. 6) At time of appointment of commissioner judge fix compensation.

§ 1252. (Sec. 7) Parties using water under the decree must have suitable headgates and measuring boxes, failure to do so will deprive them of water.

§ 1253. (Sec. 8) Repeal.

An Act authorizing the United States to appropriate water. [Sess. L. 1905, p. 80. Approved Feb'y 27, 1905.

§ 1254. (Sec. 1) Government of United States may appropriate water, in same manner and subject to same conditions as individuals. Appropriation held valid for three years after filing of notice. Work of construction must commence within three years. Notice of abandonment may be filed before three years.

§ 1255. (Sec. 2) Repeal.

§ 1256. (Sec. 3) Act in force from and after passage and approval.

An Act to regulate sale of state lands capable of reclamation. [Sess. L. 1905, p. 116. Approved Feb'y 28, 1905.

§ 1257. (Sec. 1) State to co-operate with U. S. All irrigable lands owned by the state under any national irrigation system shall be disposed of in the farm units as fixed by United States, and subject to all limitations and conditions of the Reclamation Act.

§ 1258. (Sec. 2) All state lands needed by the United States for reclamation work shall be deeded at minimum price $10.00 per acre. United States granted right of way across state lands.

§ 1259. (Sec. 3) Repeal.

§ 1260. (Sec. 4) In force from and after passage and approval.

An Act granting to the United States right to use or enlarge canals or ditches. [Sess. L. 1905, p. 153. Approved March 2, 1905.

§ 1261. (Sec. 1) United States may use the right of way of any existing ditch, canal or reservoir, subject to following provisions: 1. Such ditch, canal or reservoir may be condemned. 2. Having been condemned it may be enlarged or extended without charge or cost to its owners, provided that such enlargement or extension shall not deprive its owners of their water rights.

§ 1262. (Sec. 2) Repeal.

§ 1263. (Sec. 3) In force from and after its passage. "Carey Act." [Sess. L. 1903, p. 211. Approved March 7, 1903.

§§ 1264-1280. (Secs. 1-17) This act creates the Carey Land Act Board, as successor to the State Arid Land Grant Commission. Board to consist of State Engineer, Secretary of State and State Examiner. The state engineer is chairman. Meetings to be held at such times and places as state engineer may direct. Meeting held in absence of state engineer not binding until ratified by him. Sec. 6 of the act creates a state engineer to be appointed by governor for a term of four years and provides his duties. Board may have a secretary. State not obligated to pay for work under any contract, nor liable to settlers for failure of contractor. Funds deposited in "Carey Land Act Fund." "Carey Act." [Sess. L. 1905, p. 238. Approved March 8, 1905.

§§ 1281-1311. (Secs. 1-30) Grants full power to Carey Land Act Board to take all steps necessary to comply with the "Carey Act." Ratifies contracts made for reclamation of arid lands. Any person may propose to construct reclamation works, and request selection of lands. State engineer to examine and report on feasibility of plan submitted. If approved, board cause reservation of lands. If disapproved, party has 60 days to submit satisfactory proposal. Time may be extended to six months. Such applicant may apply for preliminary survey to be made by state engineer, at party's cost. Board contract with proposer setting out detailed description of works. He must file bond as required by board within 60 days. No contract made requiring more than five years. Builder may enlarge, also use surplus water for power purposes. He may operate system until permanent water rights appurtenant to ninety per cent of the lands have been sold. Board to aid co-operative reclamation projects. Failure of proposer to prosecute work according to contract cause forfeiture of contract and bond. Attorney general to institute and defend suits at

request of board. Board to classify all lands under this act, Sec. 15 is the same as Sec. 3662*p*, Colo. Act, *supra* §843 down to beginning of the last sentence. The first settler has the prior right to enter. Deed to issue after receipt of U. S. patent. The right may be forfeited by failure to pay any sums remaining due on purchase price. The water rights attach to and become appurtenant to the land. Person or company furnishing water has first lien on water right and land for deferred payments. Upon default, lien may be foreclosed and land and water right sold. Owner may redeem within 12 months after sale. If not redeemed any person desiring to settle may redeem within three months thereafter. Sheriff issue certificate of purchase, and if not redeemed, then a deed to purchaser. Person making contract with board may exercise right of eminent domain.

(*c*) *Forms.*

§ 1312. Montana has no forms prescribed by the state.

CHAPTER 39.

NEBRASKA—CONSTITUTIONAL PROVISIONS. STATUTES AND FORMS.

(*a*) *Constitutional Provisions.*

§ 1312*a*. Nebraska has no constitutional provisions on irrigation.

(*b*) *Statutes.*

[Compiled Statutes 1905, Ch. 93a, "Water Rights and Irrigation."]

§ 1312*b*. (6401) Irrigation canal defined.

§ 1312*c*. (6402) Crossing land with ditch, consent of owner; only one ditch.

§ 1313. (6403) May change place of diversion.

§ 1314. (6404) Appropriated water not permitted to run in channel of another stream, exception.

§ 1315. (6405) First in time is first in right.

§ 1316. (6406) Unlawful to waste artesian water.

§ 1317. (6407) Penalty for each waste.

§ 1318. (6408) Prosecutions for such waste.

§ 1319. (6409-6411) State divided into two water divisions, and boundaries of same.

§ 1320. (6412) State Board of Irrigation created, consisting of governor, attorney general and commissioner of Public Lands and Buildings.

§ 1321. (6413) Office of board at capitol.

§ 1322. (6413a) State Board of Irrigation keep a seal of office.

§ 1323. (6414) Governor, president of board.

§ 1324. (6415) Board elect secretary, to be an hydraulic engineer, term 2 years, salary $2,000 per annum.

§ 1325. (6416) Secretary to employ assistants.

§ 1326. (6417) Traveling expenses of secretary and assistants paid.

§ 1327. (6418) Board make biennial report to governor.

§ 1328. (6419) Board elect "under secretary" for each water division, term 2 years. Have control of distribution of water.

§ 1329. (6420) Under secretary enforce laws.

§ 1330. (6421) Report to state board.

§ 1331. (6422) Compensation of under secretary $5.00 per day, not to exceed $800 per annum and traveling expenses.

§ 1332. (6423) Board meet first Wednesdays in April and September.

§ 1333. (6424) Same as Wyoming, sec. 859, *post* ch. 49.

§ 1334. (6425) Secretary measure streams of state.

§ 1335. (6426) Appropriation for some beneficial purpose, When appropriator ceases to use it, the right ceases.

§ 1336. (6427) Board enter order determining priorities.

§ 1337. (6428) No allotment to exceed one cubic foot per second, for each 70 acres.

§ 1338. (6429) Practically same as Wyoming, sec. 873, *post* ch. 49.

§ 1339. (6430) Practically same as Wyoming, sec. 874, *post* ch. 49.

§ 1340. (6431) Same as Wyoming, sec. 875, *post* ch. 49.

§ 1341. (6432) Order of board served with summons.

§ 1342. (6433) Same as Wyoming, sec. 877, and sec. 878, first two lines, *post* ch. 49.

§ 1343. (6434) County clerk transmit to secretary transcript of claims filed prior to this act.

§ 1344. (6435) Such transcripts filed and classified.

§ 1345. (6436) Practically same as Wyoming, secs. 917, 920, 922-923, *post* ch. 49.

§ 1346. (6437) Map filed within six months.

§ 1347. (6438) Same as Wyoming, sec. 929, *post* ch. 49.

§ 1348. (6439) Same as Wyoming, sec. 928, *post* ch. 49.

§ 1349. (6440) Cubic foot per second is standard of measurement. Every inch "considered to be one inch square, orifice under a four-inch pressure and a four-inch pressure shall be from the top of the orifice in the measuring box to the surface of the water." Boxes must be six inches in height, except where less than 12 inches

are delivered. Have descending slope one-eighth of inch to foot, and 14 feet long, 50 miners' inches under four-inch pressure equivalent to one cubic foot per second of time.

§ 1350. (6441) Water districts may be created.

§ 1351. (6442) "Under Assistant" appointed by board for each district.

§ 1352. (6443) General duties of under assistant. Penalty for interfering with headgate.

§ 1353. (6444) Compensation of under assistant $5.00 per day, not to exceed $300 per annum.

§ 1354. (6445) Practically same as Wyoming, sec. 930, *post* ch. 49.

§ 1355. (6446) Practically same as Wyoming, sec. 931, *post* ch. 49.

§ 1356. (6447) Eminent domain, right of way for ditches, by condemnation.

§ 1357. (6448) Ditches may occupy state lands without compensation.

§ 1358. (6449) Petition to county judge, same proceedings as in condemnation by railroads.

§ 1359. (6450) Water public property subject to appropriation.

§ 1360. (6451) Priority of appropriation gives priority of right.

§ 1361. (6452) Appropriations of waste, seepage, swamp or spring waters governed same as appropriations from running streams.

§ 1362. (6453) Conducting water along or in natural channels.

§ 1363. (6454) Changing line of and repair of canals.

§ 1364. (6455) Water companies—may borrow money, issue bonds and mortgages.

§ 1365. (6456) Irrigation works are internal improvements.

§ 1366. (6457) Vested rights preserved.

§ 1367. (6458) Injuring works—stealing water—penalty.

§ 1368. (6459) Canals to be substantially built and bridged.

§ 1369. (6460) Canal owner have canal ready to receive water and outlets in bank for delivery.

§ 1370. (6461) Canal superintendent measure water to consumers.

§ 1371. (6462) Consumer to see that he gets no more water than he is entitled to.

§ 1372. (6463) Penalty for his receiving too much water.

§ 1373. (6464) Practically same as Wyoming, sec. 1, L. '03, ch. 69, *post* ch. 49.

§ 1374. (6465) Superintendent refusing delivery of water—penalty.

§ 1375. (6466) Canals crossing highways—bridges.

§ 1376. (6467) Embankments to be carefully maintained.

§ 1377. (6468) Overflow of road, penalty.

§ 1378. (6469) Irrigation works exempt from taxation.

§ 1379. (6470) Construction of ditch to commence within six months after permit issued, to be prosecuted diligently.

§ 1380. (6471) Deed or contract conveying right to use water must be recorded.

§ 1381. (6472) Same as Wyoming, sec. 882, *post* ch. 49.

§ 1382. (6473) Water for irrigation a natural want.

§ 1383. (6474) Mutual irrigation companies may be organized.

§ 1384. (6475) Such corporations may assess the shares of their stock.

IRRIGATION DISTRICTS—"WRIGHT ACT"

§§ 1385-1451. (6476-6541) This act, allowing for a difference in phraseology, is almost the same as the Colorado Act, *supra* §§516-571, with the following principal exceptions:

A district treasurer and an assessor are provided for, the latter shall give $500 bond (Sec. 6479), make the assessment at "full cash value of land," and deliver the assessment book to the Secretary by the 15th of May (Sec. 6491). All levies are made by the board of directors of the district (Sec. 6494), members of the board receive $3.00 per day and 5c. per mile, in attending meetings and actual expenses, and shall fix compensation of other officers (6502). Board and treasurer each execute $1000 bond (Sec. 6479). Interest on bonds payable first days of January and July each year (Sec. 6488). Board of Directors equalize assessments (Sec. 6492). Sec. 6485 provides, among other things, as follows:

"Said Board shall have the right to acquire either by purchase or condemnation, all lands and waters and other property necessary for the construction, use, maintenance, repair and improvement of any canal, canals, power, power plants of any kind or nature, and works, lands for reservoirs for the storage of need for water and all necessary appurtenances. Said Board shall also have the right to acquire by purchase any irrigation works, power plant, ditches, canals or reservoirs already constructed for the use of said district."

(c) *Forms,*

§ 1452. Application for a Permit to Appropriate the Waters of the State of Nebraska.

I,_____(Name of person signing application) of the_____(City or Village of which a resident) County of_____(Name of County) State of_____ (Name of State) being duly sworn, upon my oath say:

1st.—That the name of the applicant herefor is_____(Name of person or company for whom application is made) Post-office Address, No._____(Number and Street) Street,_____(City or Village) County_____(State)

2d.—That it is proposed to use the water applied for herein, for _____(State the purpose for which water is to be appropriated).

3d —That the name adopted for the proposed ditch or canal is the_____(Name of the canal).

4th.—That the source of the proposed appropriation is _____ (Name of creek or river from which water is to be taken).

5th.—That the amount of the appropriation desired is_____ (Number of cubic feet) cubic feet per second of time.

6th. That it is proposed to locate the headgate on the_____ (North, South, East or West) bank of the stream, in_____ (Describe lot or forty acres in which situated) of section_____(Number), Township_____(Number) Range_____ (Number, East or West) of the_____(Number) Principal Meridian.

7th.—That the said ditch or canal will be_____(Number of miles) miles in length, and pass through the following sections of land, as shown on the accompanying township plats, viz.:

_____(Describe each section through which canal passes, stating Township and Range).

8th.—That the dimensions of the proposed ditch or canal will be as follows: HEADGATE—width in clear_____(Number of feet) feet; depth of water on floor at low water_____(Depth in feet) feet.

	Location	Depth	Width on Bottom	Width on Top	Grade per Mile
CANAL OR DITCH	Below headgate	ft.	ft.	ft.	ft.
	At_____ mile	ft.	ft.	ft.	ft.
	At_____ mile	ft.	ft.	ft.	ft.
	At_____ mile	ft.	ft.	ft.	ft.
	At_____ mile	ft.	ft.	ft.	ft.

(Give dimensions at each point where reduced in size, stating miles from headgate.)

9th.—That the material to be removed amounts to_____ (Number of yards) cubic yards, consisting of_____(State character of material to be moved; whether rock, boulders, sand, clay, etc.) and that the total length of fluming required is_____(Number of feet) feet.

10th.—That the estimated cost of the proposed construction is as follows: Earthwork, $_____ Fluming, $_____ Headgate, $____ Other Expenses, $_____ Total, $_____

11th.—That the proposed ditch or canal is to be built with the intention of supplying water to irrigate the following sections or quarter-sections of land viz.:_____(Give sections and quarter-sections, stating Number, Township, and Range).

_____amounting in all to_____(Total number of acres) acres.

12th.—That construction is to be begun within_____(Number of days or months) of the date hereof, and the proposed works are to be completed on or before_____ (State day, month, and year).

13th.—That the time estimated as necessary to provide for the application of the amount of water herein applied for to the beneficial use above stated is_____(Number of years) years from_____ (Month and day) 190____

14th.—That the relation which the subscriber to this affidavit bears to said ditch, or canal, or other work, is that of_____(State whether owner, manager, superintendent, etc.) and that he is authorized to make this affidavit in behalf of the interests affected.

_____
Signature.

State of_____ } ss.
County of_____ } I hereby certify that the foregoing application was signed in my presence and sworn to before me by_____this_____day of_____190__

[Seal] _____ Notary Public.

STATE OF NEBRASKA, } ss.
Office State Board of Irrigation, } This is to certify that the foregoing application has been examined_____

STATE BOARD OF IRRIGATION,

_____ State Engineer, Secretary.

This is to certify that the foregoing application has been examined and is hereby granted subject to the following limitations and conditions:

1st. The work of excavation or construction shall begin on or before_____190__

2d. The time for completing the work of construction shall extend to_____190__

3d. The time for completing the application of water to the beneficial use indicated shall extend to_____190__

4th. The water appropriated shall be used for the purpose of irrigation.

5th. The prior right of the owners of land bordering on this stream, or through which this stream flows, to so much of the natural flow of the stream as is necessary for domestic uses, including stock water, must be respected.

6th. The prior rights of all persons who, by compliance with the laws of the State of Nebraska, have acquired a right to the use of the waters of this stream must not be interfered with by this appropriation.

7th. The amount of the appropriation shall not exceed_____ cubic feet per second of time; neither shall it exceed the capacity of said ditch or canal, nor the least amount of water that experience may hereafter indicate as necessary for the production of crops in the exercise of good husbandry; and, further, said appropriation, under any circumstances, shall be limited to one-seventieth (1-70) of a cubic foot per second of time, for each acre of land to which water is actually and usefully applied, on or before_____

STATE BOARD OF IRRIGATION,

Approved_____190__

_____ State Engineer, Secretary.

§ 1453. Application for Permit to Appropriate the Waters of the State of Nebraska for Power.

I,_____(Name of person signing application) of_____(City or Village of which a resident), County of_____(Name of County), State of_____(Name of State), being duly sworn upon my oath say:

1st.—That the name of the Applicant is_____(Name of person or company for whom application is made); Post-office address, No._____(Number and Street) Street,_____(Town) _____(County) County,_____(State).

2d.—That the water is to be used for the purpose of operating a_____

3d.—That the name adopted for the plant is the_____

4th.—That the source of the appropriation claimed is_____ (Stream).

5th.—That the amount of the appropriation claimed is_____ cubic feet per second of time.

6th.—That the headgate of the race is located on the_____ bank of the stream in_____of section_____, township_____, Range_____, of the_____Principal Meridian.

7th.—That the said race will be_____feet in length, and pass through the following sections of land as shown on the accompanying township plats, viz.:._____

8th.—That the dimensions of the race will be as follows:

AT HEADGATE—width in clear_____feet; depth of water on floor at low water_____feet.

BELOW HEADGATE—depth_____feet; width in bottom _____feet; width on top_____feet; grade per mile_____feet.

9th.—That the works will be located on_____

10th.—That the power is to be obtained from a_____(Kind of Wheel) Wheel, manufactured by_____, catalogue No._____, diameter of wheel_____inches. (If the wheel is not a turbine, give dimensions and kind of wheel.)

11th.—That the capacity of the plant will be_____

12th.—That the net power required from the shaft of the wheel to operate the mill when in good repair and proper running order will be_____horse power.

13th.—That the maximum head or fall that it is practical to maintain at average low water stage of stream is_____feet. (This should give the difference in height between the level of the water in forebay and in the tail race.)

14th.—That the amount of water necessary to operate said plant will be_____cubic feet per second.

15th.—That the stream furnishes: (*a*) At low water stage____ cubic feet per second; (*b*) At medium stage_____cubic feet per second; (*c*) At high water stage_____cubic feet per second.

16th.—That the work of construction will begin on or before the_____day of_____

17th.—That the works will be completed on or before the_____ day of_____

18th.—That the works will be put in operation on or before the _____day of_____

19th.—That the plant will be operated_____(Continuously or otherwise).

20th.—That the proposed cost of said plant is as follows:

Dam, $_____; Race, $_____; Machinery, $_____; Buildings, $_____. Total, $_____

21st.—That the relation which the subscriber to this affidavit bears to said plant is that of_____ (State whether owner, manager, etc.) and that he is authorized to make this affidavit in behalf of the interests affected.

(Jurat)_____

This is to certify that the foregoing application has been examined and is hereby granted subject to the following limitations and conditions:

1st.—The work of excavation or construction shall begin on or before_____1__

2d.—The time for completing the work, or perfecting the appropriation, shall extend to_____1__

3d.—The time for completing the application of water to the beneficial use indicated shall extend to_____1__

4th.—The amount of the appropriation shall not exceed_____ cubic feet per second.

5th.—The rights of all persons who by compliance with the laws of the State of Nebraska, governing in the appropriation of water, or who by continuous beneficial use have acquired the right to the use of the waters of_____or any tributary stream, or any stream to which_____is tributary, prior to the date of this filing, shall not be interfered with by this appropriation.

6th.—This grant is made subject to the provisions of Section 43, Article 2, of the Nebraska Irrigation Law, which gives preference to appropriators using the water for domestic and agricultural uses, over those using it for manufacturing purposes.

Approved. _____
State Engineer, Secretary.

§ 1454. Petition for a Permit to Relocate Irrigation Works.

I,_____ (Name of person signing petition) of the_____(City or Village of which a resident) County of_____ (Name of County) State of_____(Name of State), being duly sworn, upon my oath say:

1st.—That the name of the petitioner herefor is_____ (Name of person or company for whom petition is filed), Post Office Address_____ (Street number and City or Village) _____(County) County,_____(State).

2d.—That this is a petition for a permit to relocate_____ (State what it is desired to relocate, whether it is a portion of the main line of the ditch or canal, or merely the head-gate and head-reach).

3d.—That the name of the ditch, canal or other works referred to in this petition is the_____(Name of ditch or canal).

4th.—That the source of the water supply thereof is_____ (Name of stream from which water is diverted).

5th.—That the appropriation therefor is claimed by virtue of rights acquired by_____ (State whether appropriation is deemed to have been acquired by application of water to a beneficial use previous to 1889, or by posting a notice in compliance with the irrigation law of 1889, or by filing an application with the State Board of Irrigation.)

6th.—(*a*) That the present location of the head-gate is on the _____ (North, South, East or West) bank of the stream, in_____ (Describe lot or forty acres in which situated) of Section_____ (Number), Township_____ (Number, North or South) Range____ (Number, East or West) of the_____ (Number) Principal Meridian. (*b*) That the proposed location of the head-gate is on the _____ (North, South, East, or West) bank of the stream, in_____ (Describe lot or forty acres in which situated) of Section_____

(Number) Township_____ (Number, North or South) Range____ (Number, East or West) of the_____ (Number) Principal Meridian.

7th.—That the said ditch or canal_____ (Number of miles) miles in length passes through the following quarter sections of land, as shown on the accompanying township plats, viz.:_____ (Describe each quarter section thrcugh which ditch or canal passes, stating Township, Range, etc.) (*a*) That the portions of said ditch or canal_____ (Number of miles) miles in length indicated on said plats by a continuous black line, is completed. (*b*) That the portion of said ditch or canal_____ (Number of miles) miles in length, indicated on said plats by a dotted black line, is not completed.

8th.—That the said ditch or canal, when relocated, will be____ (Number of miles) miles in length and pass through the following quarter sections of land, as shown on the accompanying township plats, viz.:_____ (Describe each quarter section through which ditch or canal passes, stating Township, Range, etc.) (*a*) That the portions of said ditch or canal_____ (Number of miles) miles in length, indicated on said plats by continuous and dotted black lines, show course thereof as originally located. (*b*) That the portions of said ditch or canal_____ (Number of miles) miles in length indicated on said plats by red lines, show course thereof as relocated.

9th.—That the estimated cost of proposed relocation is as follows: Earthwork, $____; Fluming, $____; Head-gate, $____; Other expenses, $____. Total, $____.

10th.—That the work of relocation is to be begun within_____ (Number of days or months) of the date hereof, and the same will be completed on or before (State day, month and year).

_____
(Signature.)

(Jurat and certificate of examination by Board of Irrigation follow.)

§ 1455. Proof of Appropriation of the Waters of the State of Nebraska.

From_____, Div. No._____

1. Q. State your name. A. _____
2. Q. Post-office address. A. _____
3. Q. Are you the original appropriator under application No.____? A. _____
4. Q. If not the original appropriator, state nature of your interest in the works constructed under said appropriation, and when said interest was acquired. A. _____
5. Q. When was the work of excavation or construction begun? A. _____
6. Q. When was the work completed? A. _____
7. Q. What are the dimensions of the ditch (or other distributing works) built under this appropriation? A. _____
8. Q. If for irrigation, give the location and acreage irrigated the first year, and acreage irrigated each subsequent year, to the present. If for power, describe the plant. A. _____

9. Q. What crops were grown on this land in_____? Give estimated acreage of each. A. _____

10. Q. If for irrigation, give legal subdivisions of land, and the acreage in each subdivision to which water was actually and usefully applied on or before_____ If for power, give amount of water required to operate plant, and use made of the power. A. _____

11. Q. If any of the lands named above are owned by other parties, describe the tracts, and state the nature of their right in the canal. A. _____

12. Q. If any of the lands have been watered since_____ that were not watered prior to that date, describe them, giving legal subdivisions and acreage watered. A. _____

13. Q. During what months is water beneficially used? A. _____

14. Q. Give the amount of your interest in the construction of ditch and laterals. A. _____

15. Q. Does the map which accompanies this proof show correctly the area of land to which water was actually and usefully applied prior to_____? A. _____

16. Q. Have you had sufficient water each year since the use under your appropriation began? A. _____

17. Q. If not, state the years of scarcity, the months when the supply was insufficient, and the reasons of such scarcity. A. ____

REMARKS:_____

State of Nebraska, }
_____County, } ss.

I,_____, being first duly sworn, do depose and say that I have read the above and foregoing proof of Appropriation of Water, that I know the contents thereof, and that the facts therein stated are true.

IN WITNESS WHEREOF, I have hereunto set my hand this _____day of_____, 190__

_____

State of Nebraska, }
_____County, } ss

I hereby certify that the foregoing Proof of Appropriation was signed in my presence, and sworn to before me by_____, this _____day of_____, 190__

_____
Notary Public.

NOTICE.—This proof of Appropriation must be signed and sworn to by some person closely related in interest (or having authority, delegated or otherwise, to make affidavit) to the ditch, canal, or other work in question; preferably by the owner or president, secretary or manager of the Company controlling same.

This Proof must filed at the office of the State Board of Irrigation within_____days from_____190__ Delay and neglect will jeopardize the rights of appropriators.

STATE BOARD OF IRRIGATION,
ADNA DOBSON, State Engineer, Secretary.

CHAPTER 40.

NEVADA—CONSTITUTIONAL PROVISIONS, STATUTES AND FORMS.

(a) *Constitutional Provisions.*

§ 1456. Nevada has no constitutional provisions relating to irrigation.

(b) *Statutes.*

An Act to provide for measurement of streams, co-operation with United States, and creating state board of irrigation. [Stat. 1901, p. 72. Approved March 16, 1901.

§§ 1457-1463. (Secs. 1-7) Appropriates $4000 to pay United States departments of Agriculture and geological survey for the measurement of the discharge of streams and surveys of sites for storage reservoirs. Creates a state board of irrigation consisting of governor, surveyor general and attorney general. Governor is chairman; surveyor general, secretary. Board shall pay for the surveys, and cause copies of the reports to be printed for circulation in Nevada. Board also have printed copies of any United States reports dealing with irrigation which may be of value to the citizens of Nevada.

An Act to provide for co-operation with the United States' [Stat. 1903, p. 18. Approved Feb'y 16, 1903.

§ 1464. The preamble of this act recites the passage by Congress of the reclamation act, that the secretary of the interior has entered upon surveys of the Truckee, Carson, Walker and Humboldt irrigation projects, that about $10,000,000.00 is in the "Reclamation Fund," and it is desirable that a portion thereof be applied in Nevada. That it is estimated that the waters of Truckee river, now irrigating 42,000 acres can be made to supply 280,000 acres; Carson river, now irrigating 50,000, will supply 175,000; Walker river, now irrigating 40,000, will supply 200,000; Humboldt river, now irrigating 300,000, will supply 750,000—increasing the irrigated area from 432,000 to 1,405,000 acres. That similar location work is being done in other arid states, and each is seeking immediate commencement of work; that it is discretionary with secretary of interior to expend the whole or part of the fund in one or more states; that it is understood that when certain portion of lands are sold and rights paid for, the control of the projects passes to the users; that it is desirable that unity of control of the rivers on which such works are located be exercised by secretary of the interior; that it may be necessary for the secretary to condemn lands; that it is not the purpose of the secretary to impair vested rights; that it is essential that secretary be informed as to present use of water; that it is the desire of Nevada to co-operate.

Now, therefore, be it enacted:

§ 1465. (Sec. 1) All natural watercourses, lakes and waters belong to the public subject to appropriation, and right to use water becomes appurtenant to land, Beneficial use basis, measure and limit of right. Use of water declared a public use.

§ 1466. (Sec. 2) Repealed by Stat. '05, p. 66, sec. 1.

§ 1467. (Sec. 3) Office of state engineer created. Appointed by governor only on recommendation of secretary of the interior, or director of U. S. Geological Survey unless they fail to recommend. Salary not exceeding $2400 per annum. Office at capitol. Am'd Stat. '05, p. 193, §1, by dropping recommendation by United States officials

§ 1468. (Sec. 4) Take oath of office and file $5000 bond.

§ 1469. (Sec. 5) Engineer become conversant with the state as to irrigation, report and make suggestions to governor, keep records of observations, co-operate with secretary of interior.

§ 1470. (Sec. 6) Engineer may employ assistant engineer at $1200 per annum, and other assistants at total additional expense of $500. May appoint as assistants persons in service of the United States Geological Survey.

§ 1471. (Sec. 7) Receive traveling expenses.

§ 1472. (Sec. 8) Report biennially to governor.

§ 1473. (Sec. 9) Shall prepare for each stream list of appropriations, by mailing to each claimant a blank, on which claimant shall present all particulars regarding his claim.

§ 1474. (Sec. 10) Each claimant certify to claim under oath.

§ 1475. (Sec. 11) Failure to make sworn statement within 60 days, misdemeanor.

§ 1476. (Sec. 12) Engineer cause to be made examination of such stream, ditches and irrigated lands, and prepare maps.

§ 1477. (Sec. 13) Within 30 days after preparing list of priorities, engineer to issue to each claimant a certificate, and also send certified list to county recorders of counties where appropriations are made and used, who shall within ten days record same.

§ 1478. (Sec. 14) Parties feeling aggrieved may within two years bring action against engineer and all parties having interests adverse to them; court may employ hydraulic engineer and report on subject-matter.

§ 1479. (Sec. 15) Water commissioners apportion waters according to list of priorities.

§ 1480. (Sec. 16) Within 60 days after passage of this act county recorders transmit to engineer, transcript of claims recorded. Clerks of district court transmit transcript of decrees entered within 30 days.

§ 1481. (Sec. 17) State engineer made secretary of board of irrigation.

§ 1482. (Sec. 18, Am'd Stat. '05, p. 66, sec. 2) Board divide state into water divisions or districts. May appoint water commissioners and make rules for economical administration of waters.

§ 1483. (Sec. 19) Board determine number and compensation of water commissioners, who shall be under direction of engineer. Board approve commissioners bills, paid by county commissioners.

§ 1484. (Sec. 20) Person interfering with any of these officers guilty of misdemeanor.

§ 1485. (Sec. 21) Secretary of the interior authorized to institute suits to condemn.

§ 1486. (Sec. 22) $15000 appropriated to carry out provisions of this act.

§ 1487. (Sec. 23 added Stat. '05, p. 67, sec. 3) Person desiring to appropriate water make application to state engineer (for form, see *post* §1545). Engineer examine and record. If defective, 60 days allowed for re-filing.

§ 1488. (Sec. 24, added Stat. '05, p. 67, sec. 3, subd. 2) When application complies with law, engineer at cost of applicant publish notice of the application for 4 weeks. Any interested party may file written protest in 30 days. Engineer may hear evidence in support of or against application and take such action as he deems proper.

§ 1489. (Sec. 25, added Stat. '05, p. 68, sec. 3, subd. 3) If not detrimental to public welfare, engineer to approve application by endorsement and return to applicant who proceeds to perfect appropriation. Engineer may approve for less amount of water or shorter period for perfecting appropriation. Applicant aggrieved may bring action in 60 days to compel modification of endorsement. Prosecution of work before permit allowed, misdemeanor.

§ 1490. (Sec. 26, added Stat. '05, p. 68, subd. 4) On approval of application, applicant file map in 6 months.

§ 1491. (Sec. 27, added Stat. '05, p. 68, subd. 5) On proof that appropriation has been perfected, engineer issue certificate, which shall be recorded in counties where diversion and use are made. Recording fee $1.00. Priority date from filing of application.

§ 1492. (Sec. 28, added Stat. '05, p 69, sec. 3, subd. 6) Water appurtenant to land. Right may be severed and become appurtenant to other land, on approval by engineer. Notice of application to change published 4 weeks. Decision of engineer may be reviewed by courts.

§ 1493. (Sec. 29) Repeal.

Pollution of streams. [Stat. '03, p. 214, in force after July 1, 1904.

§ 1494. Act prohibits depositing of sawdust, rubbish, filth, poisonous or deleterious substances in or near streams. Violation, fine $50 to $500. $3000 appropriated to enforce act.

Incorporated Irrigation Districts—"Wright Act." Act of 1891 as amended, Comp. Laws, 1900.

§§ 1495-1545. (Secs. 374-423) This act is very similar to that of Colorado, *supra* §§516-571, with these principal differences: Two-thirds of all votes cas are necessary to carry the affirmative at any district election. Regular elections held first Tuesday in April every second year. Directors give $25,000 bond, approved by district judge. Board appoint an inspector as well as clerks and judges of election. Board meets first Tuesday of each month. Cannot condemn water rights already vested, nor ditches constructed before organization of district. Bonds to be sold for not less than 90 % of face value. Property in the district to be assessed at full cash value. Board acts as board of equalization, and makes levy to meet bonds and expenses. Property sold for unpaid assessments may be redeemed within six months. The act does not provide any proceeding for annexing contiguous territory, exclusion of territory nor for the dissolution of the district.

(c) *Forms.*

§ 1546. Application for Permit to Appropriate the Public Waters of the State of Nevada.

1. Date of receipt of application_____
2. Name of applicant_____ Postoffice address_____ County_____

I. If applicant is a corporation, give (*a*) Date and place of corporation_____ (*b*) The amount of capital stock_____ (*c*) The amount paid in_____ (*d*) The names and addresses of Directors_____

3. The quantity of water claimed is_____cubic feet per second
4. Source of water supply_____
5. Location of point of diversion_____
6. To be used for:

I. Irrigation and domestic use: (*a*) Number of acres to be irrigated_____acres. (*b*) In the following legal subdivisions____ (A list of lands to be irrigated may be appended as a part of this application).

II. Mining, power, manufacturing or transportation purposes: (*a*) To be used for_____ (*b*) Amount of power to be generated _____horse power. (*c*) At what point_____ (*d*) Is water to be returned to stream ("yes" or "no")_____ (*e*) If "yes," at what point_____

7. Estimated cost of works_____
8. Description of works for diversion:

I. Kind of works (reservoir, dam, ditch, flume, pipes or otherwise_____

II. Dimensions of works: (*a*) Height of dam,____feet; length of dam at top,____feet; length of dam at bottom,____feet; material used in construction (wood, earth, stone or concrete)_____ (*b*) Capacity of reservoir_____acre-feet. (*c*) Size of head-gate—width,____feet; height,____feet. (*d*) Ditch (flume or pipe)—width at bottom,____feet; width at water line,____feet. Average grade per mile is____feet. Length of ditch is____miles, and crosses the following quarter sections:_____to_____which is the point of intended use.

REMARKS: ------(This space not to be written in by applicants.)

Approval of State Engineer:

The number of this permit is------. Date of receipt of first application------, 190--. Return to applicant for correction----, 190. Corrected application received------, 190--. Recorded in Book------, page-------. Approved------, 190--.

This is to certify that I have examined the within application for a permit to appropriate the public waters of the State of Nevada, and hereby grant the same, subject to the following limitations and conditions: The amount of water to be appropriated not more than------cubic feet per second. The construction of the within described works to be commenced not later than------ One-fifth of the work above specified to be completed on or before-- The whole of said work to be completed on or before------ The time for the proof of beneficial use of water appropriated in accordance herewith, to extend to------

Witness my hand this------day of------, 190--.

State Engineer.

§ 1547. The State of Nevada. Proof of the Appropriation of Water.

State your name------

1. Q. Postoffice. A. ------

2. Q. State the use to which the water has been applied. A. ------

3. Q. State the means of diversion employed. A. ------

4. Q. If through a ditch, state its name. A. ------

5. Q. (*a*) State date of survey of the ditch or other distributing works through which the water claimed is diverted. (*b*) The date when the construction of such ditch was begun and when completed. A. (*a*)------ (*b*)------

6. Q. If any enlargements were made, state the date when begun and the date when completed. A. ------

7. Q. State dimensions of the ditch as originally constructed, and as enlarged. A. ------

8. Q. State the name of person, association of persons or corporation who built the ditch or canal, and the name or names of its present owners. A. ------

9. Q. State the nature of your title to the land for which an appropriation is claimed, and if not owned by you give the name of the owner and the nature of the possessory right which you exercise. A. ------

10. Q. State the year when water was first used for irrigation or other beneficial purposes, and by whom. If for irrigation, give the number of acres watered the first year, with the legal subdivisions on which the water was used, and as near as may be the acres irrigated in each legal subdivision. A. ------

11. Q. State the number of acres watered each subsequent year, and give the legal subdivisions on which the water was used, and as near as may be the acres irrigated in each legal subdivision. A. ------

12. Q. If water is claimed for irrigation, give the legal sub-

divisions of land owned or controlled by you for which an appropriation is claimed. A. ------

13. Q. State the acreage said ditch is capable of watering, give the legal subdivisions of land which it can be made to irrigate, and state who owns said land. A. ------

14. Q. State the character of the soil and the kind of crops cultivated. A. ------

15. Q. Are you an owner in said ditch? If so, state your proportionate interest therein. A. ------

16. Q. The plat prepared by the State Engineer is hereby accepted as showing correctly the location of the------Ditch and the land which can be irrigated therefrom. A. ------

17. Q. When does your irrigation season begin and when does it end? A. ------

18. Q. If water is used for other purposes than irrigation, state the nature of such use, the time when such use began, and how much water is required for such purpose? A. ------

19. Q. During what months is the water used? A. ------

20. Q. Have you had sufficient water each year since the use for which an appropriation is claimed began? If not, state the years of scarcity, the months when the supply was insufficient, and the reason of such scarcity. A. ------

Signed:

------Nevada, ------, 190--

Sworn to and subscribed before me at------, this------day of ------, 190--.

----------, Notary Public.

Remarks: ------

§ 1548. The State of Nevada. Certificate of Appropriation of Water.

Certificate Record------ Page------

WHEREAS,------has presented to the State Engineer of the State of Nevada proof of appropriation of water from-------- through the------Ditch under Permit No.----for irrigation of the lands herein described, lying and being in------County, Nevada, and for------

NOW KNOW YE, That the State Engineer, under the provisions of Section 13, Chapter 4, Statutes of Nevada, 1903, has determined the priority and amount of such appropriation as follows; Name of Appropriator------; Postoffice Address------, Nevada. General Priority Number on main stream--------; Priority Number on------; Water appropriated for------acres; Area under appropriations of equal priority,------acres; Area under prior appropriations,------acres; Date of Appropriation, ------; Description of land to be irrigated, and for which this appropriation is determined------

The right to water hereby determined is limited to irrigation, stock and domestic purposes------and the use is restricted to the place where acquired and to the purpose for which acquired; rights for irrigation to be limited to beneficial use on the land for which appropriation is herein determined.

IN TESTIMONY WHEREOF, I,------, State Engineer, have hereunto set my hand this------day of------, A. D. 190--.

----------State Engineer.

CHAPTER 41.

NEW MEXICO—CONSTITUTIONAL PROVISIONS, STATUTES AND FORMS.

(a) *Constitutional Provisions.*

§ 1549. The territory of New Mexico has no constitution. Sec. 5 of the organic act, Comp. L. '97, p. 46, grants the territorial legislature power to enact incorporation acts, providing for the incorporation of companies to operate irrigating ditches.

(b) *Statutes.*

Compiled Laws, 1897.

§§ 1550-1613. (1-63) These sections provide a system for the appropriation of water and the construction, operation and maintenance of public and private acequias.

IRRIGATION CODE.

Act creating office of Territorial Irrigation Engineer and to promote irrigation. [L. '05, p. 271. Approved March 16, 1905.

§ 1614. (Sec. 1) Natural waters belong to public. Right to appropriate for beneficial purposes not to be denied.

§ 1615. (Sec. 2) Beneficial use the basis, measure and limit of the right. Priority in time of use gives better right. By exercise of diligence, the right relates back to the initiation of the claim. Vested rights not impaired.

§ 1616. (Sec. 3) Cubic foot per second standard of measurement of flow, to be known as the second foot. Miners' inch or inch is 1-50 part of second foot. Standard of measurement of volume, the acre-foot being amount of water on an acre covered one foot deep or 43,560 cubic feet.

§ 1617. (Sec. 4) Amount to be allowed in adjudications not to exceed one second foot for each 70 acres.

§ 1618. (Sec. 5) Failure to beneficially use water four years, water reverts to public as unappropriated. Water which runs off or reappears on surface after use, subject to control of owner of works diverting it from natural stream. If such owner not prepared to conduct it to another place of use, may be used by others without charge until owner prepared to beneficially use same.

§ 1619. (Sec. 6) Place or means of diversion may be changed.

§ 1620. (Sec. 7) Owners to keep irrigation works in good condition so as not to damage property or waste water. Violation is a misdemeanor.

§ 1621. (Sec. 8) Irrigation works, when owners thereof use the waters thereof exclusively on their own lands, exempt from taxation. If water from such works is sold or rented, then works shall be taxed to extent of sales or rentals.

§ 1622. (Sec. 9) Right of eminent domain may be exercised for irrigation works.

§ 1623. (Sec. 10) Water rights appurtenant to land, and pass with a conveyance of the land.

§ 1624. (Sec. 11) Office of territorial irrigation engineer created. The administration of public waters to be under engineer and board of control.

§ 1625. (Sec. 12) Engineer appointed by governor.

§ 1626. (Sec. 13) Take oath and give $10,000 bond.

§ 1627. (Sec. 14) Salary $2000 per year. May employ assistants at additional expense of $300. He is allowed traveling expenses.

§ 1628. (Sec. 15) Report to governor 30 days before session of legislature.

§ 1629. (Sec. 16) Make rules and regulations.

§ 1630. (Sec. 17) Engineer make measurements of flow of streams. Ascertain suitable sites for reservoirs. Keep full records of all data. Other duties specified.

§ 1631. (Sec. 18) Solicitor general legal adviser of board and members.

§ 1632. (Sec. 19) Persons desiring to construct dam or dyke for storing or diverting water, notify engineer of intention and file plans, drawings and specifications. If approved, approval to be affixed thereto and one copy returned. If disapproved, returned with engineer's suggestions. Section does not apply where less than two thousand dollars to be expended.

§ 1633. (Sec. 20) Engineer to examine dams and dykes. Report defective works to judge of district court. Owners summoned. Sheriff ordered to draw off water.

§ 1634. (Sec. 21) Clerk and recorder of each county forward transcript of filings relating to water rights.

§ 1635. (Sec. 22) Whenever United States officers notify engineer that the United States intends to utilize certain waters, such waters shall not be subject to further appropriation.

§ 1636. (Sec. 23) Territory divided into six water divisions.

§ 1637. (Sec. 24) Irrigation commissioner appointed by governor for each division. These commissioners and engineer constitute board of control.

§ 1638. (Sec. 25) Commissioner give $2000 bond and take oath. Compensation $8.00 per day for not to exceed 100 days, and expenses not to exceed $5 per day, in addition to railroad or stage fare, and team hire.

§ 1639. (Sec. 26) Board meets first Monday in March each year. Shall adopt rules. Engineer has vote on all matters except on appeals from his decisions.

§ 1640. (Sec. 27) Commissioner work with engineer. Has supervision of irrigation matters in his division. Shall keep complete records.

§ 1641. (Sec. 28) Aggrieved party may appeal from decision of commissioner to engineer, whose decision is final unless appealed

from in 30 days. Appeals may be taken from decisions of engineer to board. Appeals from decisions of the board may be taken to district court in sixty days.

§ 1642. (Sec. 29) Board make all adjudications subject to review by the courts. When a stream is to be adjudicated, notice given of date when engineer begins measurements of stream and works of diversion, and of the day when the commissioner shall begin taking testimony as to rights of parties. Notice published in two issues of paper circulating in locality of stream. Commissioner may adjourn and change place of hearing.

§ 1643. (Sec. 30) Claimant certify statement under oath.

§ 1644. (Sec. 31) Commissioner begin on date specified and take testimony speedily as possible. If interested, another member of board to act.

§§ 1645-1650. (Secs. 32-37) Practically the same as Secs. 866-874 of the Wyoming act, *post* chap. 49.

§ 1651. (Sec. 38) Board fix fees Collections go into maintenance fund.

§ 1652. (Sec. 39) Ditch company may levy assessment on stock to maintain works or for improvements.

§ 1653. (Sec. 40) Board of control perform duties of former commission of irrigation.

§ 1654. (Sec. 41) Source of moneys for maintenance of board specified.

§ 1655. (Sec. 42) Repeal.

(*c*) *Forms.*

§ 1656. New Mexico has no forms.

CHAPTER 42

NORTH DAKOTA—CONSTITUTIONAL PROVISIONS, STATUTES AND FORMS.

(*a*) *Constitutional Provisions.*

§ 1657. (Art. 17, Sec. 210) All flowing streams and natural water courses shall forever remain the property of the state for mining, irrigating and manufacturing purposes.

(*b*) *Statutes.*

Revised Codes 1905, ch. 37; "Irrigation," p. 1248.

Article I—Irrigation Code.

§ 1658. (7604) Waters of the State, Public Waters.

All waters within the limits of the state from all sources of water supply belong to the public and, except as to navigable waters, are subject to appropriation for beneficial use. (1905, ch. 34, §1.)

§ 1659. (7605) Beneficial Use, Appurtenances, Priority.

Beneficial use shall be the basis, the measure, and the limit of the right to use of water, and all waters appropriated for irrigation purposes shall be appurtenant to specified lands owned by the person claiming the right to use the water, so long as the water can be beneficially used thereon. Priority in time shall give the better right. In all cases of claims to the use of water initiated prior to the taking effect of this article, the right shall relate back to the initiation of the claim, upon the diligent prosecution to completion of the necessary surveys and construction for the application of the water to a beneficial use. All claims to the use of water initiated after the taking effect of this article shall relate back to the date of receipt of an application therefor in the office of the state engineer, subject to compliance with the provisions of this article, and the rules and regulations established thereunder. (1905, ch. 34, §2.)

§ 1660. (7606) Eminent Domain.

The United States, the state, or any person, corporation or association may exercise the right of eminent domain to acquire for a public use any property or rights now or hereafter existing when found necessary for the application of water to beneficial uses, including the right to enlarge existing structures and use the same in common with the former owner. Any canal right of way so acquired shall be so located as to do the least damage to private or public property, consistent with proper and economical engineering construction. Such property or rights may be acquired in the manner provided by law for the taking of private property for public uses. (1905, ch. 34. §3.)

§ 1661. (7607) Reclaiming Waters.

Water turned into any natural or artificial water course by any party entitled to the use of such water may be reclaimed below and diverted therefrom by such party, subject to existing rights, due allowance for losses being made, as determined by the state engineer. (1905, ch. 34, §4.)

§ 1662. (7608) State Engineer—Appointment, Duties, Powers, Qualifications and Salary.

There shall he a state engineer, who shall be a technically qualified and experienced hydraulic engineer, to be appointed by the governor and such appointment confirmed by the senate. He shall hold office for the term of four years from and after his appointment, or until his successor shall have been appointed and shall have qualified. He shall have general supervision of the waters of the state and of the measurement and appropriation thereof, and shall receive a salary of two thousand five hundred dollars per annum and actual and necessary traveling expenses while away from his office, in the discharge of official duties. He shall not engage in private practice. (1905, ch. 34, §5.)

§ 1663. (7609) Assistant State Engineer and Expenses of State Engineer's Office.

The state engineer shall have power to appoint from time to time, during the season of the year when field work is practicable,

one or more assistant state engineers at a salary not to exceed one thousand eight hundred dollars per annum and actual and necessary traveling expenses while away from the office in the discharge of official duties. The state engineer may employ other and additional assistants and purchase materials and supplies for the proper conduct and maintenance of his office and department, in pursuance of appropriations as made from time to time for such purposes. The salaries and expenses of the office of the state engineer shall be paid at the same time and in the same manner as those of other officers of the state. The office of the state engineer shall be located at the seat of government. (1905, ch. 34, §6.)

§ 1664. (7610) Oath and Bond of State Engineer and Assistant State Engineer.

Before entering upon the duties of his office, the state engineer shall take and subscribe an oath of office and give bond with good and sufficient sureties to be approved by the governor, in the sum of five thousand dollars, for the faithful performance of his duties, which oath of office and bond shall, upon approval, be filed in the office of the secretary of state. The assistant state engineer shall also take and subscribe an oath for the faithful discharge of his duties, which oath shall be filed with the secretary of state, together with his appointment by the state engineer. (1905, ch. 34, §7.)

§ 1665. (7611) Auditing of Claims.

All claims for services rendered, expenses incurred, or materials or supplies furnished under direction of the state engineer and which are payable from the funds appropriated for the prosecution of the work under his direction and supervision, shall be approved by the state engineer and properly vouchered and filed in the office of the state auditor, who shall, if he finds the same to have been incurred in accordance with law, audit and allow such claims and issue his warrant on the state treasurer in payment thereof. (1905, ch 34, §8.)

§ 1666. (7612) State Engineer's Report.

The state engineer shall prepare and deliver to the governor, on or before September thirtieth of the year preceding the regular session of the legislature, and at other times when required by the governor, a full report of his office, including a detailed statement of the expenditures thereof, with such recommendations for legislation as he may deem advisable. (1905, ch. 34, §9.)

§ 1667. (7613) Fees of State Engineer.

The state engineer shall receive the following fees, to be collected in advance, and to be paid by him into the general fund of the state treasury on the last day of March, June, September and December of each year:

For filing and examining an application for permit to appropriate water, map and field notes of the same, five dollars.

For recording any permit, certificate of construction or license issued or any other water-right instrument, one dollar for the first hundred words and fifteen cents for each additional hundred words or fraction thereof.

For filing any other paper, one dollar.

For issuing certificates of construction, or license to appropriate water, one dollar each.

For making copy of any document recorded or filed in his office, fifteen cents for each hundred words or fraction thereof.

For blue print copy of any map, or drawing, ten cents per square foot or fraction thereof; for other copies of drawings, actual cost of the work.

For certifying to such copies, one dollar for each certificate.

For examining and approving in connection with water-right applications, plans and specifications for any dam, not exceeding ten feet in extreme height from the foundation, ten dollars; for a dam higher than ten feet and not exceeding thirty feet, twenty dollars; for a dam higher than thirty feet and not exceeding fifty feet, thirty dollars; for a dam higher than fifty feet, fifty dollars; or for a canal or other water conduit of an estimated capacity exceeding fifty and not more than one hundred cubic feet per second, twenty dollars; for an estimated capacity exceeding one hundred cubic feet per second, thirty dollars.

For inspecting dam sites, and construction work when required by law, or when necessary in the judgment of the state engineer, ten dollars per day and actual and necessary traveling expenses. The fees for any inspection deemed necessary by the state engineer and not paid on demand shall be a lien on any land or other property of the owner of the works, and may be recovered by the state engineer in any court of competent jurisdiction.

Rating ditches or inspecting plans and specifications of works for the diversion, storage and carriage of water, at the request of private parties, not in connection with an application for right to appropriate water, actual cost and expenses; and the state engineer shall attach his approval to such plans and specifications if found satisfactory.

For such other work as may be required of his office, the fees provided by law.

In ascertaining actual cost of any work, as the term is used in this section, the salary of any salaried officer for the time employed shall be included. (1905, ch. 34, §10.)

§ 1668. (7614) Records of State Engineer.

The records of the office of the state engineer are public records, shall remain on file in his office, and shall be open to the inspection of the public at all times during business hours. Such records shall show in full all permits, certificates of completion of construction, and licenses issued, together with all action thereon, and all action or decisions of the state engineer affecting any rights or claims to appropriate water. Certified copies of any records or papers on file in the office of the state engineer shall be evidence equally with the originals thereof; and when introduced as evidence shall be held as of the same validity as the originals. (1905, ch. 34, §11.)

§ 1669. (7615) Rules and Regulations.

The state engineer shall make all necessary general rules and regulations to carry into effect the duties devolving upon his office, and may change the same from time to time in his discretion. All such rules and regulations relating to applications for permits to

appropriate water, for the inspection of works, for the issuance of license, and for the determination of rights to the use of water, shall be modified by the state engineer, if required by a vote of the board of water commissioners hereinafter established, at least three of the four water commissioners voting in favor of such modifications. (1905, ch. 34, §12.)

§ 1670. (7616) Appeal to Board of Water Commissioners.

Such modification of the rules and regulations of the state engineer shall be voted upon by the board of water commissioners only on appeal from a decision of the state engineer. (1905, ch. 34, §13.)

Article II—Determination of Water Rights.

§ 1671. (7617) Hydrographic Surveys and Co-operation.

The state engineer shall make hydrographic surveys and investigations of each stream system and source of water supply in the state, beginning with those most used for irrigation, obtaining and recording all available data for the determination, development and adjudication of the water supply of the state. He shall be authorized to co-operate with the agencies of the federal government engaged in similar surveys and investigations, and in the construction of works for the development and use of the water supply of the state, expending for such purposes any money available for the work of his office, and may accept and use, in connection with the operation of his department the results of the work of the agencies of the government. (1905, ch. 34, §14.)

§ 1672. (7618) Suit for Adjudication of Water Rights.

Upon the completion of such hydrographic survey of any stream system, the state engineer shall deliver a copy thereof, together with copies of all data necessary for the determination of all rights to the use of the waters of such system, to the attorney general of the state, who shall within sixty days thereafter enter suit on behalf of the state for the determination of all rights to the use of such water, and shall diligently prosecute the same to a final adjudication; provided, that if suit for the adjudication of such rights shall have been begun by private parties, the attorney general shall not be required to bring suit; provided, however, that the attorney general shall intervene in any suit for the adjudication of rights to the use of water on behalf of the state if notified by the state engineer that in his opinion the public interest requires such action. (1905, ch. 34, §15.)

§ 1673. (7619) Parties and Costs of Suits.

In any suit for the determination of a right to the use of the waters of any stream system, all who claim the right to use such waters shall be made parties. When any suit has been filed, the court shall, by its order duly entered, direct the state engineer to make or furnish a complete hydrographic survey of such stream system as hereinbefore provided, in order to obtain all data necessary to the determining of the rights involved. The cost of such suit, including the costs on behalf of the state, and of such surveys, shall be charged against each of the private parties thereto in proportion to the amount of the water right allotted. (1905, ch, 34, §16.)

§ 1674. (7620) Fund for Hydrographic Surveys.

For the purpose of advancing the money required for any surveys so ordered by the court, there is hereby appropriated and set apart from any moneys in the general fund in the state treasury, not otherwise appropriated, the sum of two thousand dollars, to be known as the hydrographic survey fund, which shall be a permanent fund and which shall be used only for the payment of the expenses of such surveys; and all claims for services rendered, expenses incurred or materials or supplies furnished under the direction of the state engineer in the prosecution of said work shall be approved by the state engineer and properly vouchered and filed in the office of the state auditor, who shall, if he finds the same to have been incurred in accordance with law, audit and allow such claims and issue his warrants against the hydrographic survey fund on the state treasurer, in payment thereof. The amounts paid by the parties to said suits, on account of such surveys, shall be paid to the state treasurer, who shall credit the same to such fund, which shall continue to be available for advancing the expenses of such surveys, as ordered by the court from time to time. (1905, ch. 34, §17.)

§ 1675. (7621) Filing of Decree Adjudicating Water Rights.

Upon the adjudication of the rights of the use of the waters of a stream system, two certified copies of the decree shall be prepared by the clerk of the court, at the cost of the parties. One copy shall be filed in the office of the state engineer, and the other in the office of the water commissioner of the water division in which the stream system is situated. Such decree shall in every case declare, as to the water right adjudged to each party in priority, amount, purpose, place of use, and, as to water used for irrigation, the specific tracts of land to which it shall be appurtenant, together with such other conditions as may be necessary to define the right and its priority. (1905, ch. 34, §18.)

Article III—Appropriation of Water.

§ 1676. (7622) Application for Water Right.

Any person, association or corporation hereafter intending to acquire the right to the beneficial use of any waters, shall, before commencing any construction for such purpose, or before taking the same from any constructed works, make an application to the state engineer for a permit to appropriate, in the form required by the rules and regulations established by him. Such rules and regulations shall, in addition to providing the form and manner of preparing and presenting the application, require the applicant to state all the data necessary for the proper description and limitation of the right applied for, as to the amount of water and periods of annual use, together with such information maps, field notes, plans and specifications as may be necessary to show the method and practicability of the construction and the ability of the applicant to complete the same. All such maps, field notes, plans and specifications shall be made from actual surveys and measurements, and shall be retained in the office of the state engineer after the approval of the application. The state engineer may require additional information not provided for in the general rules and

regulations, in any case involving the diversion of five hundred cubic feet of water per second, or more, or the construction of a dam more than thirty feet high from the foundation. The owners of works proposing to store or carry water in excess of their needs for beneficial use, may make application for such excess, and shall be held as trustees of such right for the parties applying the water to a beneficial use; and shall be required to furnish the water for such parties at reasonable rates for storage, or carriage, or both, as the case may be. (1905, ch. 34, §19.)

§ 1677. (7623) Filing and Correction of Application.

The date of receipt of such application in the state engineer's office shall be indorsed thereon and noted in his records. If the application is defective as to form, or unsatisfactory as to feasibility or safety of plan, or as to the showing of the ability of the applicant to carry the construction to completion, it shall be returned with a statement of the corrections, amendments or changes required within thirty days after its receipt, and sixty days shall be allowed for the refiling thereof. If refiled, corrected as required within such time, the application shall, upon being accepted, take priority as of date of its original filing, subject to compliance with the further provisions of the law and the regulations thereunder. Any corrected application filed after the time allowed shall be treated in all respects as an original application received on the date of its refiling; provided, that the plans of the construction may be amended, with the approval of the state engineer, at any time; but no such change shall authorize any extension of time for construction beyond five years from the date of the permit, except as provided in section 7633; provided, further, that a change in the proposed point of diversion of water from a stream shall be subject to the approval of the state engineer, and shall not be allowed to the detriment of the rights of others having valid claims to the use of water from said stream. (1905, ch. 34, §20.)

§ 1678. (7624) Publication of Notice.

Upon the filing of an application which complies with the provisions of this article and the rules and regulations established thereunder, the state engineer shall instruct the applicant to publish notice thereof, in a form prescribed by him, in some newspaper of general circulation in the stream system, once a week for four consecutive weeks. Such notice shall give all essential facts as to the proposed appropriation, among them the places of appropriation and of use, amount of water, the purpose for which it is to be used, name and address of the applicant and the time when the application will be taken up by the state engineer for consideration. Proof of publication, as required, shall be filed with the state engineer within sixty days from the date of his instructions to make publication. In case of failure to file satisfactory proof of publication in accordance with the rules and regulations applicable thereto, within the time required, the application shall thereafter be treated as an original application filed on the date of receipt of proofs of publication in proper form. (1905, ch. 34, §21.)

§ 1679. (7625) Approval of Application.

Upon the receipt of the proofs of publication, the state engineer shall determine from the evidence presented by the parties inter-

ested, from such surveys of the water supply as may be available, and from the records, whether there is unappropriated water available for the benefit of the applicant. If so, he shall indorse his approval on the application, which shall thereupon become a permit to appropriate water, and shall state in such approval the time within which the construction shall be completed, not exceeding five years from the date of approval, and the time within which the water shall be applied to a beneficial use, not exceeding four years in addition thereto. (1905, ch. 34, §22.)

§ 1680. (7626) Rejection and Appeal.

If, in the opinion of the state engineer, there is no unappropriated water available, he shall reject such application. He shall decline to order the publication of notice of any application which does not comply with the requirements of the law and the rules and regulations thereunder. He may also refuse to consider or approve an application or to order the publication of notice thereof if, in his opinion, the approval thereof would be contrary to the public interest. Any applicant may appeal from such decision of the state engineer, or from any other decision by him which denies a substantial right, within sixty days from the date thereof to the district court of the county in which the proposed place of diversion or storage is situated. In the absence of such appeal, the decision of the state engineer shall be final. (1905, ch. 34, §23.)

§ 1681. (7627) Prosecution of Work.

The construction of the works shall be diligently prosecuted to completion, and if one-fifth of the work shall not be completed within one-half of the time allowed, the state engineer may accept and approve, as herein provided, an application for the use of all or any of the waters included in the permit issued to the prior applicant and the right to use such waters under the former permit shall thereupon be forfeited; provided, that the state engineer shall allow an extension of time on request of the prior applicant, equal to the time during which work was prevented by the operation of law, beyond the power of the said applicant to avoid. (1905, ch. 34, §24.)

§ 1682. (7628) Completion of Work.

On the date set for the completion of the work, or prior thereto, upon notice from the owner that the work has been completed, the state engineer shall cause the work to be inspected, after due notice to the owner of the permit. Such inspection shall be thorough and complete, in order to determine the actual capacity of the work, their safety and efficiency. If not properly and safely constructed, the state engineer may require the necessary changes to be made, within a reasonaple time, not to exceed six months, and shall not issue his certificate of completion until such changes are made. Failure to make such changes shall cause the postponement of the priority under the permit for such time as may elapse from the date for completing cash changes until made to the satisfaction of the state engineer, and applications subsequent in time shall have the benefit of such postponement of priority; provided, that for works involving the diversion of not exceeding twenty cubic feet of water per second or a dam not exceeding ten feet in the extreme height

from the foundation, the state engineer may, in his discretion, accept the report of an inspection by a reputable hydraulic engineer. (1905, ch. 34, §25.)

§ 1683. (7629) Certificate of Completion.

When the works are found in satisfactory condition, after inspection, the state engineer shall issue his certificate of construction, setting forth the actual capacity of the works and such limitations upon the water right as shall be warranted by the condition of the works, but in no manner extending the rights described in the permit. (1905, ch. 34, §26.)

§ 1684. (7630) Inspection of Works.

If the state engineer shall, in the course of his duties, find that any works used for the storage, diversion or carriage of water are unsafe and a menace to life or property, he shall at once notify the owner or his agent, specifying the changes necessary, and allowing a reasonable time for putting the works in safe condition, not exceeding three months. Upon the request of any party, accompanied by the estimated cost of inspection, the state engineer shall cause any alleged unsafe works to be inspected. If they shall be found unsafe by the state engineer, the money deposited by such party shall be refunded, and the fees for inspection shall be paid by the owner of such works; and, if not paid by him within thirty days after the decision of the state engineer, shall be a lien against any property of such owner, to be recovered by suit instituted by the district attorney of the county at the request of the state engineer. The state engineer may, when in his opinion necessary, inspect any works under construction for the storage, diversion or carriage of water, and require any changes necessary to secure their safety; and the fees for such inspection shall be a lien on any property of the owner and shall be subject to collection as provided herein; provided, that any works constructed by the United States, or by its duly authorized agencies, shall not be subject to such inspection while under the supervision of officers of the United States. (1905, ch. 34, §27.)

§ 1685. (7631) Use of Unsafe Works.

The use of works for the storage, diversion or carriage of water, at any time after an inspection thereof by the state engineer and receipt of notice from him that the same are unsafe for the purpose for which they are used, until the receipt of notice from him that in his opinion they have been made safe, shall be a misdemeanor, and it shall be the duty of the state engineer to give prompt notice to the district attorney of the county in which such works are located in case of such violation. The district attorney shall at once proceed against the owner, and all parties responsible therefor. (1905, ch. 34, §28.)

§ 1686. (7632) Application to Beneficial Use.

On or before the date set for the application of the water to a beneficial use, the state engineer shall cause the works to be inspected, after due notice to the owner of the permit. Upon the completion of such inspection, the state engineer shall issue a

license to appropriate water to the extent and under the conditions of the actual application thereof to a beneficial use, but in no manner extending rights described in the permit; provided, that the inspection to determine the amount of water applied to a beneficial use shall be made at the same time as that of the constructed work, if requested by the owner, and if such action is deemed proper by the state engineer. (1905, ch. 34, §29.)

§ 1687. (7633) Extension of Time.

The state engineer shall have the power to extend the time for the completion of construction, or for application to beneficial use, for three years and two years, respectively, but only on account of delays due to physical or engineering difficulties which could not have been reasonably anticipated, or by operation of law beyond the power of applicant to avoid. (1905, ch. 34, §30.)

§ 1688. (7634) Assignment of Permit or License.

Any permit or license to appropriate water may be assigned, but no such assignment shall be binding, except upon the parties thereto unless filed for record in the office of the state engineer. The evidence of the right to use water from any works constructed by the United States, or its duly authorized agencies, shall in like manner be filed in the office of the state engineer, upon assignment; provided, that no right to appropriate water for irrigation purposes shall be assigned, or the ownership thereof in any wise transferred, apart from the land to which it is appurtenant, except in the manner specially provided by law; provided, further, that the transfer of title to land in any manner whatsoever shall carry with it all rights to the use of water appurtenant thereto for irrigation purposes. (1905, ch. 34, §31.)

§ 1689. (7635) Transfer of Water Records.

It shall be the duty of the county register of deeds and the county auditor of each county in the state, within thirty days after the taking effect of this chapter, to prepare and forward by express, or registered mail at the expense of the county, to the office of the state engineer, a transcript of all records relating to water rights; provided, that they may forward any original records in their offices which have been duly recorded. The state engineer shall classify and arrange such records to conform to stream systems, and shall send copies thereof relating to each water division to the water commissioner thereof. He shall likewise forward to the water commissioner copies of all records, permits and licenses to appropriate water relating to his division, and shall advise him of all acts and decisions of the state engineer's office affecting the apportionment of waters in his division. (1905, ch. 34, §32.)

§ 1690. (7636) Referee in Water Suits.

In any water suit the court may appoint a referee or referees not exceeding three, to take testimony and report upon the rights of the parties, as in other equity cases. (1905, ch. 34, §33.)

§ 1691. (7637) Attorney General and State's Attorney Advisers of State Engineer.

The attorney general, and the state's attorney of the county in which legal questions arise, shall be the legal advisers of the state

engineer, and shall perform any and all legal duties necessary in connection with his work, without other compensation than their salaries as fixed by law, except when otherwise provided. (1905, ch. 34, §34.)

§ 1692. (7638) Charge for Carrying and Delivering Water.

The owner or owners of any works for the storage, diversion or carriage of water, which contain water in excess of their needs for irrigation or other beneficial use for which it has been appropriated, shall be required to deliver such surplus at reasonable rates for storage, or carriage, or both, as the case may be, to the parties entitled to the use of the water for beneficial purposes. In case of the refusal of such owner or owners to deliver any such surplus water at reasonable rates as determined by the state engineer, they may be compelled to do so by the district court for the county in which the surplus water is to be used. (1905, ch. 34, §35.)

§ 1693. (7639) Appropriation of Water by the United States.

Whenever the proper officers of the United States, authorized by law to construct works for the utilization of waters within the state, shall notify the state engineer that the United States intends to utilize certain specified waters, the waters so described, and unappropriated at the date of such notice, shall not be subject to further appropriation under the laws of this state for a period of three years from the date of said notice, at which time the proper officers of the United States shall file plans for the proposed work in the office of the state engineer for his information, and no adverse claim to the use of the waters required in connection with such plans initiated subsequent to the date of such notice, shall be recognized under the laws of this state, except as to such amount of the water described in such notice as may be formally released in writing by an officer of the United States, thereunto duly authorized; provided, that in case of failure to file plans of the proposed work within three years, as herein required, the waters specified in the notice given by the United States to the state engineer shall become public waters, subject to general appropriations. (1905, ch. 34, §36.)

Article IV—Water Commissioners.

§ 1694. (7640) Water Divisions.

The state shall be divided into water divisions as follows:

Water division No. 1 shall consist of all that portion of the state west and south of the Missouri river.

Water division No. 2 shall consist of all lands within the state drained by the Mouse river and its tributaries, and of all lands within the state north and east of the Missouri river drained by the Missouri River and its tributaries from the boundary of the state of Montana as far down as Fort Berthold.

Water division No. 3 shall consist of all lands within the state east of the Missouri river drained by the Missouri river and its tributaries below Fort Berthold, and of all lands within the state drained by the James or Dakota river and its tributaries.

Water division No. 4 shall consist of all lands within the state drained by the Red river and its tributaries, except the Mouse river, as hereinbefore specified, and all the lands within the state drained into Devil's lake. (1905, ch. 34, §37.)

§ 1695. (7641) Water Commissioners.

The governor may nominate, and by and with the advice and consent of the senate appoint, a water commissioner for each water division, as hereinbefore established, to serve for the term of six years, or until his successor shall have qualified, and shall be subject to removal by the governor; provided, the water commissioners first appointed after the taking effect of this chapter shall serve for the terms specified as follows: Water division No. 1, six years; water division No. 2, four years; water division No. 3, two years; water division No. 4, six years; provided, further, that during any temporary or permanent vacancy in the office of water commissioner, the powers and duties of such water commissioner shall devolve on the state engineer. (1905, ch. 34, §38.)

§ 1696. (7642) Duties of Water Commissioners.

Each water commissioner shall have the supervision of the apportionment of water in his division, according to the licenses issued by the state engineer and the adjudications of the courts. Each commissioner shall have the custody of the records relating to his division, which shall be public records, and shall be transmitted to his successor in office. Each water commissioner, before entering upon the duties of his office, shall take and subscribe an oath of office and give a bond with good and sufficient sureties, to be approved by the supreme court, in the sum of two thousand dollars, for the faithful performance of the duties of this office, which oath and bond shall, upon approval, be filed in the office of the secretary of state. (1905, ch. 34, §39.)

§ 1697. (7643) Board of Water Commissioners.

The water commissioners of all the water divisions, together with the state engineer, who shall be president thereof, shall constitute the board of water commissioners, which shall have general supervision of the apportionment of the waters of the state. The board shall adopt general rules and regulations to govern its proceedings and the operations in the various divisions. The state engineer shall have a vote on all matters coming before the board, except appeals, authorized by law, from his acts as the state engineer. The board shall meet on the first Monday in March of each year, at the office of the state engineer, and at such other times and places as may be agreed upon by a majority of its members, whereupon the state engineer shall give notice of such meeting to all members. (1905, ch. 34, §40.)

§ 1698. (7644) Pay of Water Commissioners.

The water commissioners shall be paid from the state treasury out of the moneys appropriated for such purposes at the rate of ten dollars per day for the time actually engaged in official duties, not exceeding two hundred days in any one year, and shall also be paid actual and necessary traveling expenses while away form their homes on official business. (1905, ch. 34, §41.)

§ 1699. (7645) Water Districts.

The state engineer shall, from time to time, as may be necessary for the economical and satisfactory apportionment of the water,

divide each water division in conformity with drainage areas, into water districts to be designated by names, and to comprise, as far as possible, one or more distinct stream systems in each district. The districts may be changed from time to time as may in his opinion be necessary for the economical and satisfactory apportionment of the water. (1905, ch. 34, §42.)

§ 1700. (7646) Water Masters.

The water commissioners of each division shall appoint, subject to the approval of the state engineer, a water master for each district, in his division, who may be removed by the commissioner, or by a majority of the board of water commissioners. The water master shall have immediate charge of the apportionment of the waters in his district under the general supervision of the water commissioner, and he shall so apportion, regulate and control the waters of the district as will prevent waste. (1905, ch. 34, §43.)

§ 1701. (7647) Appeals to State Engineer.

Any person may appeal from the acts or decisions of the water master and water commissioner, to the state engineer, who shall promptly and at a stated time and place, to be fixed by him, upon due notice to the parties, hear and determine the matter in dispute, and his decision shall be final, unless an appeal is taken to the courts within thirty days. (1905, ch. 34, §44.)

1702. (7648) Pay to Water Masters.

The water master shall be allowed pay at the rate of four dollars per day and actual and necessary expenses in the performance of his duties. He may employ assistants in cases of emergency, upon the specific authority of and at rates of pay as authorized by the water commissioner, such employment to continue only during the existence of the emergency. The water master and assistants employed by him shall be paid by the county, upon accounts approved by the water commissioner. If the district is in more than one county, each county shall pay its proportionate part of each account rendered. The accounts of the water master shall in all cases specify the distribution of the amounts charged, based upon the amount of work performed as to each ditch and water right, showing the charges to be allotted to each owner. The amounts paid by the counties shall be a lien upon the property of the water users and ditch owners, in accordance with the distribution thereof, as shown by the accounts of the water master, and shall be collected in the manner provided by law for the collection of taxes. (1905, ch. 34, §45.)

§ 1703. (7649) Reports of Water Masters.

Each water master shall report to the water commissioner, as often as may be deemed necessary by the commissioner, as to the amount of water needed to supply the requirements of his district, the amount available, the works which are without their proper supply, the supply required during the period preceding his next regular report, and such other information as the commissioner may require. These reports shall at the end of each irrigation season, be filed in the office of the state engineer. The water com-

missioner shall give directions for correcting any errors of apportionment in his division that may be shown by such reports. (1905, ch. 34, §46.)

Article V—Miscellaneous Provisions.

§ 1704. (7650) Units of Measurement.

The standard of measurement of the flow of water shall be the cubic foot per second of time; the standard of measurement of the volume of water shall be the acre-foot, being the amount of water upon an acre covered one foot deep, equivalent to forty-three thousand five hundred sixty cubic feet. The miners' inch shall be regarded as one-fiftieth of a cubic foot per second in all cases, except when some other equivalent of the cubic foot per second has been specially stated by contract, or has been established by actual measurement or use. (1905, ch. 34, §47.)

§ 1705. (7651) Abandonment.

When the party entitled to the use of water fails to beneficially use all or any part of the water claimed by him, for which a right of use has vested, for the purpose for which it was appropriated, or adjudicated, for a period of three years, such unused water shall revert to the public and shall be regarded as unappropriated public water. (1905, ch. 34, §48.)

§ 1706. (7652) Amount of Water for Irrigation.

In the issuance of permits to appropriate water for irrigation or in the adjudication of the rights to the use of water for such purpose, the amount allowed shall not be in excess of the rate of one cubic foot of water per second for each eighty acres, or the equivalent thereof, delivered on the land, for a specified time in each year. (1905, ch. 34, §49.)

§ 1707. (7653) Water Appurtenant to Land for Irrigation Purposes.

All water used in this state for irrigation purposes shall remain appurtenant to the land upon which it is used; provided, that if for any reason it should at any time become impracticable to beneficially or economically use water for the irrigation of any land to which the right of use of the same is appurtenant, said right may be severed from said land, and simultaneously transferred, and become appurtenant, to other land, without losing priority of right theretofore established, if such change can be made without detriment to existing rigths, on the approval of such application of the owner to the state engineer. Before the approval of such application, the applicant must give notice thereof by publication once a week for four weeks in a newspaper of general circulation in the stream system in which the tracts of land are located, in the form required by the state engineer. Upon the receipt of the proofs of publication, the state engineer shall render his decision thereon in writing, which shall be final, unless some party interested in the same source of water supply shall within sixty days bring appropriate action in the district court of the county in which the land is located for a review of such decision. If the owner of the land to which water has become appurtenant abandons the use of such waters upon such land, said waters shall become public waters, subject to general appropriation. (1905, ch. 34, §50.)

§ 1708. (7654) Change of Use or Place of Diversion.

Any appropriator of water may use the same for other than the purpose for which it was appropriated, or may change the place of diversion, storage or use, in the manner, and under the conditions, prescribed in section 7653. (1905, ch. 34, §51.)

§ 1709. (7655) Measuring Devices.

Every ditch owner shall construct and maintain a substantial headgate at the point where the water is diverted, and shall construct a measuring device, of a design approved by the state engineer, at the most practicable point or points for measuring and apportioning the water as determined by the state engineer. The state engineer may order the construction of such device by the ditch owner, and if not completed within twenty days thereafter, the water commissioner shall, upon instruction from the state engineer, refuse to deliver water to such owner. The taking the water by such ditch owner until the construction of such device and the approval thereof by the state engineer shall be a misdemeanor. Such devices shall be so arranged that they can be locked in place, and when locked by the water master or his authorized agent, for the measurement or apportionment of water, it shall be a misdemeanor to interfere with, disturb or change the same, and the use of water through such device after having been interfered with, disturbed or changed, shall be *prima facie* evidence of the guilt of the person benefited by such interference, disturbance or change. (1905, ch. 34, §52.)

§ 1710. (7656) Unlawful Interference With Rights to Use Water.

Any person, association or corporation in interfering with or injuring or destroying any dam, headgate, weir, bench-mark or other appliance for the diversion, storage, apportionment or measurement of water, or for any hydrographic surveys, or who shall interfere with any person or persons engaged in the discharge of duties connected therewith, shall be guilty of a misdemeanor, and shall also be liable for the injury or damage resulting from such unlawful act. The water master or any authorized assistant within his district, shall have power to arrest any person offending against the provisions of this section, and deliver him to the nearest peace officer of the county. It shall be the duty of the person making the arrest to make complaint at once before the court having jurisdiction thereof. The state engineer, the water commissioners, the water masters and their authorized assistants and agents, may enter upon private property for the performance of their respective duties, doing no unnecessary injury thereto. (1905, ch. 34, §53.)

§ 1711. (7657) Unlawful Use of Water, and Waste.

The unauthorized use of water to which another person is entitled, or the willful waste of water to the detriment of another, shall be a misdemeanor. It shall also be a misdemeanor to begin or carry on any construction of works for storing or carrying water until after the issuance of permit to appropriate such waters, except in the case of construction carried on under the authority of the United States. (1905 ch. 34, §54.)

§ 1712. (7658) Bridges Over Ditches or Canals.

The owner or owners of any ditch, canal or other structure for storing or carrying water, shall construct and maintain a substantial bridge where the same crosses any highway or publicly traveled road, not less than fourteen feet wide; or reconstruct the road in a substantial manner and in a convenient location for public travel. Any violation of the provisions of this section shall be a misdemeanor. The county commissioners shall be authorized to construct such bridge or road, if not built by the owner of the work within three days after the obstruction of the road, and may recover the expense thereof and costs in a civil suit, unless the same shall be paid by the owner of the works within ten days after demand therefor. The county commissioners may make reasonable requirements as to the size and character of such bridges along public highways, or for the necessary reconstruction of roads, and upon failure to comply therewith, may do the necessary work and collect the expense thereof and costs as hereinbefore provided. After the construction of such bridge or road as part of a public highway, the same shall be maintained by the county commissioners. (1905, ch. 34, §55.)

§ 1713. (7659) Obstructing Works.

Whenever any appropriator of water has the right of way for the storage, diversion or carriage of water, it shall be unlawful to place or maintain any obstruction that shall interfere with the use of the works, or prevent convenient access thereto. Any violation of the provisions of this section shall be a misdemeanor. (1905, ch. 34, §56.)

§ 1714. (7660) Penalty for Misdemeanors Under this Article.

All violations of the provisions of this article declared herein to be misdemeanors, shall be punished by a fine not exceeding two hundred fifty dollars, nor less than twenty dollars, or by imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment; any justice court of the county in which such misdemeanor has been committed shall have jurisdiction thereof. (1905, ch. 34, §57.)

§ 1715. (7661) Liens on Land.

All liens on land, provided for in this article, shall be superior in right to all mortgages or other incumbrances placed upon the land and the water appurtenant thereto or used in connection therewith, after the taking effect of this chapter. (1905, ch. 34, §58.)

§ 1716. (7662) Seepage Water.

In the case of seepage water from any constructed works, any party desiring to use the same shall make application to the state engineer, as in the case of unappropriated water, and such party shall pay the owner of such works reasonable charge for the storage or carriage of such water in such works; provided, that the appearance of such seepage water can be traced beyond reasonable doubt to the storage or carriage of water in such works. The state engi-

neer shall not issue a permit to appropriate such seepage waters until an agreement for the payment of such charges shall have been entered into by the said parties. (1905, ch. 34, §59.)

§ 1717. (7663) Right of Way Over State Lands.

There is hereby granted over all the lands now or hereafter belonging to the state, a right of way for ditches or canals and for tunnels, tramways and telephone and electrical transmission lines, constructed by authority of the United States. All conveyances of state lands hereafter made shall contain a reservation of such right of way. (1905, ch. 34, §60.)

§ 1718. (7664) Disposition of State Lands.

No lands belonging to the state, within the areas to be irrigated from works constructed or controlled by the United States, or its duly authorized agencies, shall hereafter be sold except in conformity with the classification of farm units by the United States, and the title to such lands shall not pass from the state, until the applicant therefor shall have fully complied with the provisions of the laws of the United States and the regulations thereunder concerning the acquisition of the right to use water from such works and shall produce the evidence thereof duly issued. After the withdrawal of lands by the United States for any irrigation project, no application for the purchase of state lands within the limits of such withdrawal shall be accepted, except upon the conditions prescribed in this section. Any state lands needed by the United States for irrigation works shall be sold to the United States at the lowest price authorized by law. (1905, ch. 34, §61.)

§ 1719. (7665) Appropriations.

There is hereby appropriated out of any moneys in the general fund of the state treasury not otherwise appropriated the sum of six thousand dollars annually, or so much thereof as may be necessary, for the payment of the salaries and expenses of the state engineer and assistant state engineers, and the services of assistants and expenses of the office and department of the state engineer as provided by this article. All claims for services rendered and expenses incurred and materials and supplies furnished under the provisions of this article shall be audited by the state auditor for payment by the state treasurer in accordance with the provisions of the general statutes relating to the auditing of claims against the state. (1905, ch. 34, §62.)

§ 1720. (7666) Duty of State Engineer or Assistant to Co-operate with County Commissioners when Requested.

Whenever requested so to do by any of the boards of commissioners of any of the counties of this state, it is hereby made the duty of the state engineer, either by himself, or by any authorized assistant engineer, to co-operate with said county commissioners in the engineering work required to lay out, establish and construct any drain to be used by any county or counties or portions of the same for the purpose of diverting flood waters, lakes, water courses, and in general to aid and assist the counties of this state in making preliminary surveys and establishing systems of drainage. (1905, ch. 34, §63.)

Article VI—Water Users' Associations.

§ 1721. (7667) State or Municipalities May Join Water Users' Associations. Fee for Recording Articles by Register of Deeds.

The state of North Dakota may, through the board of university and school lands, and the counties, townships, cities, towns and villages of the state, through their corporate authorities, join water users' associations. The register of deeds is hereby authorized to accept from water users' associations organized in conformity with the requirements of the United States under the reclamation act, books containing printed copies of their articles of incorporation and forms of subscription to stock, and to use such books for recording the stock subscriptions of such association; and the charges for the recording thereof shall be made on the basis of the number of words actually written therein. (1905, ch. 193, §1.)

§ 1722. (7668) Right of Way Granted.

A right of way is hereby granted to all duly incorporated water users' associations by and with the consent of the state board of university and school lands, to construct over and across all state, school and institute lands, flumes, ditches and canals for irrigation purposes and to construct on such lands reservoirs for the storage of water for irrigation purposes. (1905, ch. 193, §2.)

Article VII—Establishment and Maintenance of Dams.

§ 1723. (7669) Dams for Mills or Irrigating Purposes.

When any person may be desirous of erecting and maintaining a dam upon his own land, across any water course not navigable, and shall deem it necessary to raise the water by means of such dam, or occupy ground for mill yard, or for irrigation purposes, so as to damage by overflowing or otherwise, real estate not owned by him, nor damaged by consent, he may obtain the right to erect and maintain said dam by proceedings as in this article provided; provided, that all dams erected under the provisions of this article shall be constructed with such sluiceways as will allow fish to ascend any stream so dammed. (1899, ch. 71, §1; R. C. 1899, §5973*a*.)

§ 1724. (7670) Shall Petition the Court.

He shall present to the judge of any court of record in which jury trials are had in the county, or, if there be no such court in the county, then in the district in which said dam or any part thereof is to be located, a petition naming each person known to be affected or damaged, setting forth the place as near as may be, where said dam is to be located, the height to which it will be raised, the purposes to which the water power will be applied, and such other facts as may be necessary to show the object of the petition. (1899, ch. 71, §2; R. C. 1899, §5973*b*.)

§ 1725. (7671) Commissioners.

Upon the presentation of such petition, the judge shall appoint three disinterested residents of the county in which said dam or a part of it is to be erected, commissioners to meet at the place of its

proposed erection, on a day specified by such judge, and to inquire, touching the matters contained in said petition, and the judge shall fix the fees of said commissioners. Before entering upon their duties the commissioners shall severally take and subscribe an oath before some person qualified to administer oaths, faithfully and impartially to discharge the duties of their appointment. (1899, ch. 71, §§3, 4; R. C. 1899, §5973*c*.)

§ 1726. (7672) Notice of Meeting.

At the request of the petitioners the commissioners shall give, or cause to be given, notice of the time, place and object of their meeting to every person named by said petitioner. At least thirty days' notice shall be given in all cases, which shall be served in the manner prescribed by law for the service of summons in the district court, and such notice shall be published for at least four successive weeks in a newspaper in the county nearest the location of the proposed dam. (1899, ch. 71, §§5, 6; R. C. 1899, §5973*d*.)

§ 1727. (7673) Preliminary Survey.

The commissioners shall meet at the time and place specified in the notice, and shall cause a preliminary survey to be made, and shall proceed to examine the point at which said dam is proposed to be erected, and the lands and real estate above and below which will probably be injured by the erection of said dam; shall hear the allegations and testimony of all parties interested, and shall proceed to make a separate assessment of damages which will result to any person by the erection of said dam for mill or irrigation purposes and its maintenance. (1899, ch. 71, §7; R. C. 1899, §5973*e*.)

§ 1728. (7674) Report of Proceedings.

Within thirty days after completing their examination, the commissioners shall file the petition, their appointment, jurats (oaths) and a report of their proceedings, in the office of the clerk of the court in section 7669 (*supra* §1723) mentioned, and shall give notice of the filing of said report as of their meeting, to all persons named in the petition, or that may be shown to be damaged by the preliminary survey. (1899, ch. 71, §8; R. C. 1899, §5973*f*.)

§ 1729. (7675) Payment of Damages.

Upon the filing of said report the petitioners may make payment of the damages assessed to the parties entitled to the same in the following manner, to wit:

1. To parties laboring under no disability.
2. To guardians of infants, husbands or trustees of *femmes covert*.
3. To guardians or conservators of insane persons.

And receipt for such payment filed in the office of the clerk aforesaid shall estop the parties receipting from all further claim or proceeding in the premises. Payments to parties in the state, but not in the county or counties, where said dam or a part of it is to be erected, as well as to the infants who have no guardians, and insane persons who have no guardians or conservators, and payments to parties residing out of the state, and to persons whose names are unknown and to persons who shall refuse to receive the payments when tendered, shall be made by depositing the money

with the treasurer of the county or counties aforesaid, who shall pay out the same upon the order of the commissioners or court, take receipts for all payments, and file the same with the order, in the office of the clerk of the court aforesaid, and such deposit shall have the same effect as the first mentioned receipts unless an appeal be taken by the party entitled thereto. (1899, ch. 71, §9; R. C. 1899, §5973*g*.)

§ 1730. (7676) Appeal Bond.

Appeals from the assessment made by the commissioners may be taken and prosecuted in the court aforesaid by any party interested, the petitioner excepted, not under legal disability, by husbands or trustees of *femmes covert*, guardians of infants, guardians or trustees of insane persons, and in cases where infants or insane persons have no guardians or conservators, appeals may be taken by the friends of such persons and a written notice of such appeal be served upon the appellee, as a summons in ordinary civil actions; provided, that no appeal shall be taken after the expiration of thirty days from the time of the notification of the filing of the report aforesaid. The erection of said dam shall not be hindered, delayed or prevented by the prosecution of any appeal, provided, the petitioner shall execute and file with the clerk of the court in which the appeal is pending a bond to be approved by said clerk with surety or sureties, conditioned that the person executing the same shall pay whatever amount is required by the judgment of the court, and abide any rule or order of the court in relation to the matter in controversy. (1899, ch. 71, §§10, 11; R. C., 1899, §5973h.)

§ 1731. (7677) Bond Approved by Clerk.

The appellant shall file with the clerk aforesaid, a bond with surety, to be approved by said clerk, in double the amount of the assessment appealed from, payable to the people of the state, for the use of all persons interested, in the condition in which bond the proceedings appealed from shall be recited, with condition for the due and speedy prosecution of the appeal, and that he or they will satisfy the judgment that may be rendered in the premises and pay the costs of the appeal, if adjudged to do so by the court in reference to the matter in controversy. (1899, ch. 71, §12; R. C. 1899, §5973*i*.)

§ 1732. (7678) When Submitted to the Jury.

Appeal shall bring before the court the propriety of the amount of damages reported by the commissioners in respect to the parties to the appeal, and unless the parties otherwise agree, the matter shall be submitted to and tried by a jury the same as other appeal cases, and the court or jury, as the case may be, shall assess the damages aforesaid, making the verdict conform to the question and facts in the case. (1899, ch. 71, §13; R. C. 1899, §5973*j*.)

§ 1733. (7679) Exemplary Damages.

No exemplary or vindictive damages shall be allowed by the commissioners, court or jury. (1899, ch. 71, §14; R. C. 1899, §5973*k*.)

§ 1734. (7680) Judgments.

Upon verdicts rendered by juries, or an assessment by the court, judgment shall be entered, declaring that upon payment of the

damages assessed by the court or jury, as the case may be, and costs, if any, the right to erect and maintain the dam aforesaid, according to the petition, shall, as against the parties interested in such verdict, be and remain in the petitioner, his heirs and assigns for ever, subject to be lost as hereinafter provided, and payments of such judgments made as payments of assessments, by the commissioners as hereinbefore provided. (1899, ch. 71, §15; R. C. 1899, §5973*l*.)

§ 1735. (7681) Water Power Shall Not Be Injured. Action for Damages.

No dam shall be erected or maintained under the provisions of this article to the injury of any water power previously improved. No action for damages, occasioned by the erection and maintenance of such dam shall be hereafter sustained unless such action be brought within two years after the erection of said dam; provided, that such limitation shall not run against and apply to persons living on and holding government land under the pre-emption laws, until a patent for the land damaged or overflown shall have been issued. (1899, ch. 71, §§16, 17; R. C. 1899, §5973*m*.)

§ 1736. (7682) Who May Maintain Dam.

Any person may obtain a right to maintain or raise a dam heretofore erected upon his own land, across any water course not navigable, by complying with the provisions of this article, adapting his petition to the nature of the case. (1899, ch. 71, §18, R. C. 1899, §5973*n*.)

§ 1737. (7683) May Suspend Suit. Costs.

Upon the evidence of the commencement of proceedings, as provided in sections 7670 and 7682, the court before which any suit for damages occasioned by such dam shall be instituted after the commencement aforesaid, shall have power to suspend any suit until the result of such proceedings shall be known. The cost of all proceedings under this article, except such as arise or grow out of appeals, shall be paid by the petitioner, and costs of appeals shall be paid as the court may direct. (1899, ch. 71, §§19, 20: R. C. 1899, §5973*o*.)

§ 1738. (7684) Surveys and Examinations.

For the purpose of making surveys and examinations relating to any proceedings under the provisions of this article, it shall be lawful to enter upon any land, doing no unnecessary injury. (1899, ch. 71, §21; R. C. 1899, §5973*p*.)

§ 1739. (7685) When Construction Must Commence.

Any person having obtained right to erect and maintain, or to maintain or raise any dam, under the provisions of this chapter, who shall not within one year thereafter begin to build said dam, and finish the same and apply the water power thereby created to the purposes stated in his petition within three years; or in case the said dam shall be destroyed, shall not begin to rebuild in one year after such destruction, and finish in three years, or in case of a mill dam shall fail to keep such mills in operation for one year at any one time, shall forfeit all rights required by virtue of the provisions

of this article, unless at the time of such destruction the owner be an infant, or otherwise disabled in law, in which case the same time shall be allowed after the removal of such disability; provided, however, where the water, backed up by any dam belonging to any mill owner or machinery, is about to break through or over the banks of the stream or race, or to wash a channel so as to turn the water of such stream or race, or any part thereof, out of its ordinary channel, whereby such mill or machinery will be injured or affected, the owner or occupier of such mill or machinery, if he does not own such banks or the lands lying contiguous thereto, may, if necessary, enter thereon and erect and keep in repair such embankments and other works as shall be necessary to prevent such water from breaking through or over the banks of such stream or race, or washing a channel as aforesaid, such owner or occupier committing thereon no unnecessary waste or damage, and being liable to pay any damages which the owner of the land may actually sustain by the erection and repair aforesaid; provided, further, that if any person shall injure, destroy or remove any such embankment or other works, the owner or occupier of such mill or machinery, or in case the said dam is for purposes of irrigation, the owner thereof may recover of such person all damages he may sustain by reason of such injury destruction or removal. (1899, ch. 71, §22; R. C. 1899, §5973*q*.)

(*c*) *Forms.*

§ 1740. Application for a Permit to Appropriate Water within the State of North Dakota.

(Note—Draw a line through items not applicable.)
1. Name of applicant_____ Postoffice address_____, County_____, State_____
I. If a corporation: (*a*) Name of same_____ (*b*) Date and place of incorporation_____ (*c*) Amount of capital stock_____ (*d*) Amount paid in_____ (*e*) Names and addresses of directors _____ (Note—A certified copy of articles of incorporation must accompany the application.)
II. Method of accomplishing the work and financial resources of the applicant: (*a*) Method of accomplishing the work. (Whether by contract, employment of others, or by direct labor)_____ (*b*) Cash on hand, $_____ (*c*) Treasury stock, $_____ (*d*) Bonds to be issued, $_____ (*e*) Other resources, $_____
2. Name of diversion works_____
3. Quantity of water claimed _____cubic feet per second.
4. Source of water supply_____
5. Location of point of diversion_____on_____ (Right or left bank looking down stream) bank.
6. Annual periods during which water is to be used_____
7. To be used for:
I. Irrigation or domestic use: (*a*) Number of acres to be irrigated_____acres. (*b*) Legal subdivisions to be irrigated_____ (Note—A list of lands to be irrigated, giving each subdivision and fraction with acreage thereof, should be written here, or may be appended as a part of this application. Same must also be shown on accompanying map.) (*c*) Statement as to domestic use (giving location, etc.)_____
II. Mining, power, manufacturing, transportation, or other purposes: (*a*) Nature of use_____ (*b*) Amount of power to be

generated_____horse power. (c) Location of plant_____ (d) Method of developing power_____ (e) Point where water will be returned to stream_____

8. Estimated cost of works: (a) Headgates, $_____ (b) Pumping plant, $_____ (c) Fluming, $_____ (d) Canal—earth, $_____ rock; $_____ (e) Other structures_____$____ Total, $_____

9. Description of diversion works:

I. Nature of works: (Reservoir, dam, ditch, flume, pumping plant, etc.)_____

II. Dimensions of works: (a) Dam: Height_____feet; length at bottom____feet; length at top____feet; thickness at bottom____ feet; thickness at top____feet; slope of front (water) face____; slope of back face_____; material used in construction_____ (b) Reservoir: Capacity when filled____acre feet. Surface area at high-water mark_____acres.

Depth at Outlet—Feet	Surface Area at Each_____Feet of Depth at Outlet—Acres	Capacity—Acre-feet

(c) Headgate: Width_____feet; height_____feet; material _____
(d) Canal: Total length_____miles.

Location Below Headgate	Depth	Bottom Width	Width at Water Line	Grade Per Mile
At mile	feet	feet	feet	feet
At mile	feet	feet	feet	feet

(Give dimensions where reductions in size are made.)

10. Time required for completion of work_____years.

11. Time required for complete application of water to the proposed beneficial use_____years.

12. Choice of newspaper for publication of notice of intention to appropriate_____

State of North Dakota }
County of ..... } ss

I,_____, being first duly sworn, on my oath depose and say: That my relation to the above described undertaking is that of ____ (Owner, manager or engineer), that I have read the above and foregoing statement, and examined the map accompanying the same, and that I know of my own personal knowledge that the matters therein stated and shown are true.

Signed_____

Subscribed and sworn to before me this_____day of_____190__

_____
Notary Public (or other qualified officer).

Remarks (by State Engineer):

State of North Dakota }
County of_____ } ss

Bismarck, N. Dak.,_____190__

This is to certify that the foregoing application was received at this office at_____o'clock__m. upon the_____day of_____, 190__, and that after examination it was_____

_____
State Engineer.
By_____
Deputy.

Number of Permit_____ Date of first receipt of application _____190__, Date of return to applicant for correction_____ 190__ Date of receipt of corrected application_____190__ Date from which application may claim right_____190__

Approved_____190__ Recorded in Book____Page____

This is to certify that I have examined the foregoing application for a permit to appropriate water of the state of North Dakota, and I hereby grant the same as stated herein, subject, however, to the following limitations and conditions:

1st. The equivalent of at least one-fifth of the work above specified is to be completed on or before _____, 19__

2d. The whole of said work is to be completed on or before____, 19__

3d. The limit of time for proof of beneficial use of water appropriated in accordance herewith is_____, 19__

4th. The water appropriated shall be used for the purpose of _____.

5th. The prior right of all persons who, by compliance with the laws of the state of North Dakota, have acquired a right to the use of water, must not be injuriously affected by this appropriation.

6th. The amount of appropriation herein granted shall not exceed_____cubic feet of water per second of time; neither shall it exceed the capacity of the above described system of diversion works, nor the least amount of water that experience may hereafter indicate as necessary for the production of crops in the exercise of the best husbandry; and further, said appropriation must be limited to not more than one-eighteenth (1-80) of one cubic foot of water per second of time for each acre of land to which water is actually and beneficially applied on or before_____, 19__, said water to be used during the following described annual periods:

Witness my hand this_____day of_____190__

_____
State Engineer.
By_____
Deputy.

§ 1741. Application for Permit to Appropriate Water—Enlargement.

(This form is same as form in §1740 *supra*, down to paragraph No. 2.)

2. Name of existing diversion works_____Permit No._____ Name of enlargement or extension_____

3. Quantity of water claimed by enlargement or extension____ cubic feet per second.

4. Source of water supply_____

5. Location of point of commencement of extension_____

6. Annual periods during which water is to be used_____

(The remainder of this form is the same as form in §1740 *supra*, beginning with paragraph number 7.)

§ 1742. Notice of Intention to Appropriate Water.

(First Publication_____190__)

APPROPRIATION OF WATER.

Office of the State Engineer,

Bismarck, N. D.,_____,190__

Notice is hereby given that_____whose postoffice address is _____County, N. D., has made an application in accordance with the provisions of the irrigation laws of North Dakota for a permit to appropriate for beneficial use____cubic feet of water per second of time from_____through the_____, the point of diversion of which is to be located upon the____bank of said stream in the____ 1-4 of the____1-4 of section____township____range____said water to be used for the purpose of_____upon the_____

This application will be taken up by the state engineer at his office at Bismarck for consideration and appropriate action upon the_____day of_____190__ at 9 a. m., at which time all persons who believe that the prior rights would be injuriously affected, or that the allowance of the permit would be detrimental to the public welfare, and also parties making the application, and to be benefited, are notified to be present either by sworn affidavit or in person for the purpose of presenting any relevant testimony.

_____
State Engineer.

§ 1743. Proof of Publication—Appropriation of Water.

PROOF OF PUBLICATION.

State of North Dakota, }
County of_____ } *ss.*

_____being duly sworn, deposes and says that the annexed printed copy of Notice of Intention to Appropriate Water was taken from the_____a newspaper which, during the whole time of publication of said notice hereinafter stated, has been and is printed and published in the_____of_____, County of_____ and State of North Dakota. That the said notice was published in said newspaper on the following dates:_____in each and every issue of the full number thereof, commencing on the_____ day of_____ 190__, and ending on the____day of____190__, upon which days or times

of publication aforesaid the newspaper was regularly published, and that during the whole time of said publication he was_____ the printer__and publisher__of the said newspaper.

_____

Subscribed and sworn to before me this____day of____A. D. 190__

_____

Notary Public_____County, N. D.

CHAPTER 43.

OKLAHOMA—CONSTITUTIONAL PROVISIONS, STATUTES AND FORMS.

(a) *Constitutional Provisions.*

§ 1744 Oklahoma has as yet no constitutional provisions.

(b) *Statutes.*

Laws of 1905, ch. 21, p. 274.

§ 1745-7. (Secs. 1-3) Same as §§7605-7 of North Dakota act *supra*, §§1659-1661.

§§ 1748-70. (Secs. 4-26) Same as §§7617-39 of North Dakota act, *supra*, §§1671-1693.

1771-74. (Secs. 27-30) Same as §§7650-53 of North Dakota act, *supra*, §§1704-1707, except that the last half of §7650 of North Dakota, beginning with "miners' inch," is not in the Oklahoma act. In §28 the time is fixed at two years non-use. In §29 the acreage is limited to 70.

§ 1775. (Sec. 31) Territorial engineer have supervision over apportionment of the water. Make rules and regulations subject to governor's approval.

§§ 1776-80. (Secs. 32-36) Same as §§7645-49 North Dakota act, *supra* §§1700-1703, except that water masters are appointed by territorial engineer with the approval of the governor, and his compensation is fixed at $3.00 per day and he shall report to the engineer.

§§ 1781-91. (Secs. 37-47) Same as §§7654-7664 North Dakota act, *supra* §§1708-1718.

§ 1792. (Sec. 48.) Water users' association exempt from annual incorporation and franchise tax. Shall pay $10 for filing articles, and issuance of certificate.

§ 1793. (Sec. 49) County commissioners authorized to accept from water users' associations books with copies of articles and forms of stock subscription.

§ 1794. (Sec. 50) Water users' association may reimburse those making prior filings for their outlay.

§§ 1795-97. (Secs. 51-53) §51 same as §7614, §52 same as §7615, §53 same as §7613 of North Dakota act, *supra* §§1667-1669.

§ 1798. (Sec. 54) Secretary of Board of Agriculture to perform duties of engineer in absence of statutory provision creating the office of territorial engineer.

(*c*) *Forms.*

§ 1799. No forms were obtainable from Oklahoma.

CHAPTER 44

OREGON—CONSTITUTIONAL, PROVISIONS, STATUTES AND FORMS.

(*a*) *Constitutional Provisions.*

§ 1800. Oregon has no constitutional provisions relating to water.

(*b*) *Statutes.*

Bellinger & Cotton's Ann. Codes, Title XI "Of Water Rights."

§ 1801. (Sec. 4993) Use of water for rental, sale or distribution for irrigation, and domestic purposes, is a public use. Right to collect rates for such use is a franchise.

§ 1802. (Sec. 4994) Right to appropriate water and to condemn rights of way granted.

§ 1803. (Sec. 4995) Right to enter on land and survey right of way granted.

§ 1804. (Sec. 4996, Am'd L. '05, p. 401, §1) Notice to be posted at point of diversion, duplicate filed in office of county clerk in 15 days after posting, certified copy of such duplicate to be filed with state engineer, together with maps, field notes, plans and specifications.

§ 1805. (Sec. 4997) Am'd L. '05, p. 401, §1, *supra* §1804.

§ 1806. (Sec. 4998) Corporation may proceed to condemn right of way.

§ 1807. (Sec. 4999) Action to condemn brought in circuit court.

§ 1808. (Sec. 5000) Riparian rights may be condemned by action in circuit court of county where riparian lands situated. If it is desired to commence construction before trial, bond securing payment of all damages that may be awarded may be served upon defendant. Defendant may object to sufficiency of bond.

§ 1809. (Sec. 5001) Construction of ditch must commence within 6 months after posting notice. Prosecuted with diligence. Actual capacity of diverting works determines extent of appropriation. On compliance with this act right to use water relates back to date of posting the notice.

§ 1810. (Sec. 5002) Existing appropriations respected.

§ 1811. (Sec. 5003) Ditches, canals, flumes, and feeders for reservoirs may be extended when the channel of the source of supply changes.

§ 1812. (Sec. 5004) Shortest practicable route must be selected for canals, etc.

§ 1813. (Sec. 5005) Second corporation may use canal, etc., of the first and if necessary enlarge same.

§ 1814. (Sec. 5006) Natural depressions in the earth may be utilized.

§ 1815. (Sec. 5007) Headgates must be maintained.

§ 1816. (Sec. 5008) Ditch owner liable for damage caused by leakage or overflow.

§ 1817. (Sec. 5009) Bridges must be built at road crossings. Liability for failure to construct.

§ 1818. (Sec. 5010) Embankments of ditches and reservoirs must be maintained.

§ 1819. (Sec. 5011) Corporation may acquire right of way for distributing ditches, but is not required to do so, nor to construct them. When distributing ditch is built by an individual and the rate for use of water tendered the company, it shall connect distributing ditch with the main canal and deliver the water.

§ 1820. (Sec. 5012) Lien on crops for value of the water supplied.

§ 1821. (Sec. 5013) Ditches, etc., are real estate.

§ 1822. (Sec. 5014) Right to appropriate may be lost by abandonment. Failure to use water for one year deemed an abandonment, but question of abandonment is one of fact.

§ 1823. (Sec. 5015) Willfully breaking or opening headgate, or embankment, a misdemeanor.

§ 1824. (Sec. 5016) In suits to protect water rights, all parties using water from same stream may be made parties, and one decree may settle relative rights of all. Court may require all parties brought in.

§ 1825. (Sec. 5017) Right of way granted over state lands.

§ 1826. (Sec, 5018) Legislature may fix rates for use of water.

§ 1827. (Sec. 5019) Ditches utilizing waste, spring or seepage water governed by same laws as ditches taking water from natural stream.

§ 1828. (Sec. 5020) Machinery may be used to raise water to level where used.

§ 1829. (Sec. 5021) In times of shortage, domestic use shall have preference of all others. Agriculture over manufacturing.

§§ 1830-1852. (Secs. 5022-44) Provide for the appropriation of water for mining and electrical power, and are practically the same as §§1801-1825 *supra*.

§§ 1853-1859. (Sec. 5045-51) Provide for the appropriation of water for the use of public institutions.

Genl. Laws, 1905, ch. 228, p. 401.

§ 1860. (Sec. 1) See *supra*, §1804.

§ 1861. (Sec. 2) United States authorized to appropriate water. On filing notice with state engineer the unappropriated waters in that source deemed appropriated by United States. Provided, final plans of proposed works are filed in three years, and construction work authorized within four years.

§ 1862. (Sec. 3) State engineer shall make survey of stream from which United States intends to appropriate, deliver data to attorney general who together with district attorney shall, at request of secretary of interior, enter suit to determine rights to the use of water.

§ 1863. (Sec. 4) All who claim water from the same stream system shall be parties. Costs taxed as in other equity suits.

§ 1864. (Sec. 5) Decree fixing relative rights of parties to be entered.

§ 1865. (Sec. 6) State engineer to be appointed by governor upon recommendation of director of United States Geological Survey. Term four years. Have general supervision of all measurements records of appropriation, surveys and engineering work. Salary $2,400 per annum.

§ 1866. (Sec. 7) Give $5000 bond and take oath of office.

§ 1867. (Sec. 8) Records of state engineer, public records.

§ 1868. (Sec. 9) Fees of state engineer.

§ 1869. (Sec. 10) Engineer to make hydrographic and topographic surveys and co-operate with United States.

§ 1870. (Sec. 11) Disposition of state lands.

§ 1871. (Sec. 12) Right of way over state lands granted to United States.

§ 1872. (Sec. 13) Appropriations.

IRRIGATION DISTRICTS.

Bellinger & Cotton's Ann. Codes and Stat., ch. v, of Irrigation Districts.

§ 1873. (Sec. 4700) See Colo., sec. 1, *supra* §516.

§ 1874. (Sec. 4701) See Colo., secs 2-4, *supra* §§517-519.

§ 1875. (Sec. 4702) See Colo., sec. 5, *supra* §520.

§ 1876. (Sec. 4703) Same as Cal., sec. 19, *supra* § 290, omitting portion between "provided" and "and each member."

§ 1877. (Sec. 4704) See Colo., sec. 7, *supra* §522.

§ 1878. (Sec. 4705) See Colo., sec. 8, *supra* §523, except polls open one hour after sunrise to sunset.

§ 1879. (Sec. 4706) After polls close judges count votes in public. Clerks keep tally.

§ 1880. (Sec. 4707) Certificates places on poll list and tallies one copy kept by chairman for six months. Ballots strung on cord sealed with poll list and tallies and delivered to secretary of district.

§ 1881. (Sec. 4708) See Colo., sec. 9, *supra* §524.

§ 1882. (Sec. 4709) See Colo., sec. 10, *supra* §525.

§ 1883. (Sec. 4710) Board meet and organize first Tuesday after election. Power to manage affairs of district and execute contracts, employ agents, make and cause to be printed by-laws and regulations. Land owner may assign right to use water for any one year.

§ 1884. (Sec. 4711) Directors meet first Tuesday of each month. Special meetings may be ordered by majority of board. All meetings public, and three members a quorum. Board and agents have right to enter on land to make surveys and locate works, and may acquire either by purchase or condemnation all lands and water rights and other property necessary for the works of the district, including lands and canals constructed or being constructed by private owners. In case of purchase, bonds of district may be used at par. The use of water hereunder a public use.

§ 1885. (Sec. 4712) See Colo., sec. 13, *supra* §528, down to word "provided."

§ 1886. (Sec. 4713) See Colo., sec. 14, *supra* §529, to words "judicial notice."

§ 1887. (Sec. 4714) See Colo., sec. 15, *supra* §530, down to the word "provided."

§ 1888. (Sec. 4715) See Colo., sec. 16, *supra* §531, except that bond may sell for 90 per cent. face value.

§ 1889. (Sec. 4716) See Colo., sec. 17, *supra* §532.

§ 1889*a*. (Sec. 4717) Between first Monday in March and first Monday in June, district assessor must assess all lands "a charge sufficient to pay" the various expenses of the district.

§ 1890. (Sec. 4718) If assessment insufficient, assessor under order of board may assess the estimated additional cost the same as the original assessment.

§ 1891. (Sec. 4719) List of charges to be entered in district lien docket. District lien docket is a public record and entries constitute liens.

§ 1892. (Sec. 4721) See Cal., sec. 37, *supra* §308.

§ 1893. (Sec. 4722) See Cal., sec. 38, *supra* §309.

§ 1894. (Sec. 4723) See Cal., sec. 39, *supra* §310.

§ 1895. (Sec. 4724) See Cal., sec. 40, *supra* §311.

§ 1896. (Sec. 4725) See Cal., sec. 41, *supra* §312.

§ 1897. (Sec. 4726) See Cal., sec. 42, *supra* §313, down to "provided."

§ 1898. (Sec. 4727) See Cal., sec. 43, *supra* §314.

§ 1899. (Sec. 4728) See Cal., secs. 44-45, *supra* §§315-316.

§ 1900. (Sec. 4729) See Cal., sec. 46, *supra* §317.

§ 1901. (Sec. 4730) See Cal., sec. 47, *supra* §318, except portion between "provided" and "redemption."

§ 1902. (Sec. 4731) See Cal., sec. 48, *supra* §319.

§ 1903. (Sec. 4732) See Cal., sec. 49, *supra* §320.

§ 1904. (Sec. 4733) See Cal., sec. 50, *supra* §321.

§ 1905. (Sec. 4734) See Cal., sec. 51, *supra* §322.

§ 1906. (Sec. 4735) See Cal., sec. 52, *supra* §323.

§ 1907. (Sec. 4736) See Colo., sec. 23, *supra* §538, excepting that the contractor's bond is for 25 per cent. of the amount of the contract.

§ 1908. (Sec. 4737) See Cal., sec. 54, *supra* §325.

§ 1909. (Sec. 4738) See Cal., sec. 55, *supra* §326.

§ 1910. (Sec. 4739) See Cal., sec. 56, *supra* §327.

§ 1911. (Sec. 4740) See Colo., sec. 27, *supra* §542, except that directors receive $3 per day.

§ 1912. (Sec. 4741) See Colo., sec. 27, *supra* §542.

§ 1913. (Sec. 4742) See Cal., secs. 59-60, *supra* §§330-331.

§ 1914. (Sec. 4743) See Colo., sec. 28, *supra* §543.

§ 1915. (Sec. 4744) See Cal., sec. 62, *supra* §332.

§ 1916. (Sec. 4745) See Cal., sec. 63, *supra* §333.

§ 1917. (Sec. 4746) See Cal., sec. 64, *supra* §334.

§ 1918. (Sec. 4747) See Cal., sec. 65, *supra* §335.

(*c*) *Forms.*

§ 1919. No forms were obtainable from the state of Oregon.

CHAPTER 45.

SOUTH DAKOTA—CONSTITUTIONAL PROVISIONS, STATUTES AND FORMS.

(*a*) *Constitutional Provisions.*

§ 1920. South Dakota has no constitutional provisions relating to irrigation.

(*b*) *Statutes.*

Session Laws, 1905, ch. 132, Irrigation, p. 201.

§§ 1921-27. (Secs. 1-7) Are the same as secs. 7604-7609 of Stat. North Dakota, *supra* §§1658-1664.

§§ 1928-30. (Secs. 8-10) Are the same as secs. 7612-7614 of Stat. North Dakota, *supra* §§1666-1668.

§ 1931. (Sec. 11) Bond of state engineer in sum of $5000, approved by attorney general.

§§ 1932-62. (Secs 12-42) Are the same as secs. 7615-7645 of Stat. North Dakota, *supra* §§1669-1700.

§ 1963. (Sec. 3) Same as sec. 7647 of Stat. North Dakota, *supra* §1702.

§§ 1964-1978. (Secs. 44-58) Are the same as secs. 7650-7664 of Stat. North Dakota, *supra* §§1704-1768.

The following differences are found in the statutes of South Dakota: Sec. 8, term of state engineer 6 years, salary $2000 per annum. Sec. 9, one assistant allowed at $5.00 per day, who shall give $5000 bond. Sec. 40, state divided into two water divisions. Sec. 44, the water commissioners receive $5.00 per day for not to exceed 100 days each year. Sec. 45, the period for non-use is fixed at two years. Sec. 46, the acreage is fixed at 70. Sec. 54, the penalties are fine not exceeding $100 nor less than $20 or imprisonment in county jail not exceeding 30 days, or both.

§ 1979. (Sec. 59) Lands under canals supplying water for rent, are entitled to water from such canal, provided the charge for water is paid up each year. In case of disagreement the county commissioners fix rate.

Revised Code, 1903, P. C. ch. 26, Artesian Wells and Irrigation.

§§ 1980-1989. (Secs. 2619-2627) Repealed by Laws '05, p. 202.

§§ 1990-2010. (Secs. 2627-2647) Provide for the sinking of artesian wells by companies, granting the right of eminent domain for the construction of canals and ditches conveying water therefrom, method of assessing damages, and rules governing the management of such companies.

§§ 2011-2043. (Secs. 2648-2679) Provide for the sinking of artesian wells by counties, the issuance of warrants to provide funds therefor, method of conducting elections for the voting of warrants, calling for bids for construction work, and providing the duties of the various county officers in the premises.

§§ 2044-2096. (Secs. 2680-2731) Provide for the sinking of artesian wells by civil townships, the issuance of bonds to provide funds therefor, and in many respects comparing the irrigation district acts of other states.

§§ 2097-2099. (Secs. 2732-2734) Authorize any county, municipal corporation, civil township or district except cities of first class, to vote bonds for providing water for irrigation and domestic use.

§§ 2100-2112. (Secs. 2735-2746) Provide for the storage of surface water.

§§ 2113-2115. (Secs. 2747-2749) Provide for the storage of surplus water.

§§ 2116-2120. (Secs. 2750-2754) Provide for the construction of dams and reservoirs and their maintenance.

§§ 2121-2126. (Secs. 2755-2760) Miscellaneous provisions.

(c) *Forms.*

§ 2127. Application for Permit to Appropriate Water—Original.

(Note—Draw a line through items not applicable.)

1. Name of applicant_____Postoffice address_____, County _____, State_____

I. If a corporation:_____ (a) Name of same_____ (b) Date and place of incorporation_____ (c) Amount of capital stock_____ (d) Amount paid in_____ (e) Names and addresses of directors:_____ (Note—A certified copy of articles of incorporation must accompany the application.)

II. Method of accomplishing the work and financial resources of the applicant: (a) Method of accomplishing the work. (Whether by contract, employment of others, or by direct labor)_____ (b) Cash on hand, $____ (c) Treasury stock, $____ (d) Bonds to be issued, $____ (e) Other resources, $____

2. Name of diversion works_____

3. Quantity of water claimed____cubic feet per second.

4. Source of water supply_____

5. Location of point of diversion_____ on_____ (Right or left bank looking down stream) bank.

6. Annual periods during which water is to be used_____

7. To be used for:

I. Irrigation or domestic use: (a) Number of acres to be irrigated____acres. (b) Legal subdivisions to be irrigated_____ (Note—A list of lands to be irrigated, giving each subdivision and fraction with acreage thereof, should be written here, or may be appended as a part of this application. Same must also be shown on accompanying map.) (c) Statement as to domestic use (giving location etc.)_____

II. Mining, power, manufacturing, transportation, or other purposes: (a) Nature of use_____ (b) Amount of power to be generated_____horse power. (c) Location of plant_____ (d) Method of developing power_____ (e) Point where water will be returned to stream_____

8. Estimated cost of works: (a) Head gates, $_____ (b) Pumping plant, $_____ (c) Fluming, $_____ (d) Canal—earth, $_____; rock, $_____ (e) Other structures____$_____ Total, $____

9. Description of diversion works:

I. Nature of works: (Reservoir, dam, ditch, flume, pumping plant, etc.)_____

II. Dimensions of works: (a) Dam: Height_____feet; length at bottom____feet; length at top____feet; thickness at bottom ____feet; thickness at top____feet; slope of front (water) face___; slope of back face_____; material used in construction_____ (b) Reservoir: Capacity when filled____acre-feet. Surface area at high-water mark____acres.

Depth at Outlet—Feet	Surface Acre at Each_____Feet of Depth at Outlet—Acres	Capacity—Acre-feet

(c) Headgate: Width____feet; height____feet; material_____
(d) Canal: Total length_____miles.

Location Below Headgate	Depth	Bottom Width	Width at Water Line	Grade Per Mile
At mile	feet	feet	feet	feet
At mile	feet	feet	feet	feet

(Give dimensions where reductions in size are made.)

10. Time required for completion of work_____years.

11. Time required for complete application of water to the proposed beneficial use_____years.

12. Choice of newspaper for publication of notice of intention to appropriate_____

State of South Dakota }
County of _____ } ss.

I,_____, being first duly sworn on my oath depose and say: That my relation to the above described undertaking is that of____ (Owner, manager or engineer), that I have read the above and foregoing statement, and examined the map accompanying the same, and that I know of my own personal knowledge that the matters therein stated and shown are true.

Signed_____

Subscribed and sworn to before me this_____day of_____190__

_____
Notary Public (or other qualified officer).

Remarks by State Engineer:_____

State of South Dakota }
County of _____ } ss.

Pierre, South Dakota,_____190__

This is to certify that the foregoing application was received at this office at_____o'clock__m. upon the_____day of_____190__ and that after examination it was_____

_____
State Engineer.

By_____
Deputy.

Number of permit_____ Date of first receipt of application _____190__ Date of return to applicant for correction____190__ Date of receipt of corrected application_____190__ Date from which application may claim right_____190__ Approved_____ 190__, Recorded in Book____Page____

This is to certify that I have examined the foregoing application for a permit to appropriate water of the State of South Dakota, and I hereby grant the same as stated herein, subject, however, to the following limitations and conditions:

1st. The equivalent of at least one-fifth of the work above specified is to be completed on or before_____19__

2d. The whole of said work is to be completed on or before____ 19__

3d. The limit of time for proof of beneficial use of water appropriated in accordance herewith is_____19__

4th. The water appropriated shall be used for the purpose of _____

5th. The prior right of all persons who, by compliance with the laws of the State of South Dakota, have acquired a right to the use of water must not be injuriously affected by this appropriation.

6th. The amount of the appropriation herein granted shall not exceed_____cubic feet of water per second of time; neither shall it exceed the capacity of the above described system of diversion works, nor the least amount of water that experience may hereafter indicate as necessary for the production of crops in the exercise of the best husbandry; and further, said appropriation must be limited to not more than one-seventieth (1-70) of one cubic foot of water per second of time for each acre of land to which water is actually and beneficially applied on or before_____19__; said water to be used during the following described annual periods _____

Witness my hand this_____day of_____190__

_____
State Engineer.

By_____
Deputy.

§ 2128. Application for Permit to Appropriate Water—Enlargement.

(The beginning of this form is identical with form in §2127 *supra*, down to paragraph number 2.)

2. Name of existing diversion works_____Permit No._____ Name of enlargement or extension_____

3. Quantity of water claimed by enlargement or extension____ cubic feet per second.

4. Source of water supply_____

5. Location of point of commencement of extension_____

6. Annual periods during which water is to be used_____

(The remainder of this form is identical with form in §2127 *supra*, beginning with paragraph number 7.)

§ 2129. Notice of Intention to Appropriate Water.

(First Publication_____190__)

APPROPRIATION OF WATER.

Office of the State Engineer,

Pierre, S. D.,_____190__

Notice is hereby given that_____whose postoffice address is _____County, S. D., has made an application in accordance with the provisions of the irrigation laws of South Dakota for a permit to appropriate for beneficial use____cubic feet of water per second of time from_____through the____, the point of diversion of which is to be located upon the____bank of said stream in the_____ 1-4 of the__1-4 of section____township____range____, said water to be used for the purpose of_____upon the_____

This application will be taken up by the state engineer at his office at Pierre for consideration and appropriate action upon the _____day of_____190__, at 9 a. m., at which time all persons who believe that the prior rights would be injuriously affected, or that the allowance of the permit would be detrimental to the public welfare, and also parties making the application, and to be benefited, are notified to be present either by sworn affidavit or in person for the purpose of presenting any relative testimony.

_____
State Engineer.

CHAPTER 46.

TEXAS—CONSTITUTIONAL PROVISIONS, STATUTES AND FORMS.

(*a*) *Constitutional Provisions.*

§ 2130. Texas has no constitutional provisions relating to irrigation.

(*b*) *Statutes.*

§ 2131. (Art. 3108) Commissioners Courts authorized to regulate time, mode and manner of constructing cleaning and protecting dams, ditches, roads and bridges, belonging to irrigation farms, provided such farms, ditches, etc. be owned con-jointly by two or more persons, and be situated outside of a corporation having jurisdiction.

§ 2132. (Art. 3109) Said courts have general powers over subject.

§ 2133. (Art. 3110) If the owner of a suerte or subdivision lot in said farm fail to perform his share of labor on dam, etc., the commissioners court may lease such suerte, etc., at public outcry, to person bidding the shortest term, not exceeding four years.

§ 2134. (Art. 3111) Commissioners court may license irrigation.

§ 2135. (Art. 3112) If commissioners court deem it necessary that a ditch should cross the land of another, after hearing on notice, may make a decree authorizing same, and depute two or more persons to fix the damage.

§ 2136. (Art. 3113) When public health damaged by irrigation or damming of water, notice given and after hearing, commissioners court may order dams or ditches discontinued and may proceed to break and destroy them.

§ 2137. (Art. 3114) Commissioners court may establish fence laws regulating irrigation farms.

§ 2138. (Art. 3115) Unappropriated waters public property.

§ 2139. (Art. 3116) Storm or rain waters may be stored and held in dams, reservoirs or lakes.

§ 2140. (Art. 3117) The ordinary flow or underflow of waters may be diverted.

§ 2141. (Art. 3118) Appropriation of water must be either for irrigation, mining, milling, the construction of water works for cities and towns or stock raising.

§ 2142. (Art. 3119) As between appropriators "the first in time is first in right."

§ 2143. (Art. 3120) Statement showing number of acres irrigated, name, size and location of headgate of ditch, carrying capacity, the source of supply names of owners, and a map of route, to be filed in county, clerk's office in county where headgate located, within 90 days after commencement of construction.

§ 2144. (Art. 3121) By compliance with preceding section, date of priority relates back to time when construction was commenced.

§ 2145. (Art. 3122) Any person, firm, association of persons or corporation may appropriate.

§ 2146. (Art. 3123) Completion defined as conducting water in main canal to place of use.

§ 2147. (Art. 3124) When an appropriation made it is unlawful for any others to divert any water so appropriated. Certain privileges given and reserved to owners of riparian lands.

§ 2148. (Art. 3125) Corporations may be formed to operate under this chapter.

§ 2149. (Art. 3126) Right of way over public lands granted.

§ 2150. (Art. 3127) Surplus water to be returned to stream from which it comes.

§ 2151. (Art. 3128) Right of way across highways granted, bridges to be built, and usefulness of road not to be impaired. If road needed for dam or reservoir site, commissioners may change road.

§ 2152. (Art. 3129) No cause of action for damages to ditch, canal, reservoir or dam unless fenced.

§ 2153. (Art. 3130) Liens granted on crops for value of water rented to raise such crops.

§ 2154. (Art. 3131) Conditions under which corporations may acquire lands.

(c) *Forms.*

§ 2155. Texas has no centralized control and no forms are obtainable.

CHAPTER 47.

UTAH—CONSTITUTIONAL PROVISIONS, STATUTES AND FORMS.

(a) *Constitutional Provisions.*

§ 2156. (Art. XI., Sec. 6) Municipal corporations forbidden to sell, lease or dispose of water works, water rights, or sources of water supply, but may exchange same for other water rights or sources of supply of equal value.

§ 2157. (Art. XIII, Sec. 3) Ditches, canals and flumes owned and used by individuals or corporations, for irrigating lands owned by such individuals or corporations, or the individual members thereof, shall not be separately taxed so long as they shall be owned and used exclusively for such purpose.

§ 2158. (Art. XVII, Sec. 1) All existing rights to the use of any of the waters in this state for any useful or beneficial purpose, are hereby recognized and confirmed.

(b) *Statutes.*

Laws 1905, ch. 108, p. 145.

§ 2159. (Sec. 1) Practically same as sec. 7608, N. Dakota, *supra* §1662, except no salary is mentioned.

§ 2160. (Sec. 2) Salary of engineer $3000, payable quarterly. Actual traveling expenses when called from office.

§ 2161. (Sec. 3) Office at the capitol.

§ 2162. (Sec. 4) Take oath, and file $5000 bond with not less than two sureties.

§ 2163. (Sec. 5) Engineer report biennially to governor. Keep on file in his office full records of his work. All records, maps and other papers in his office open to public inspection during office hours.

§ 2164. (Sec. 6) Engineer make hydrographic surveys of each river system beginning with those most used for irrigation; from data obtained, prepare maps showing facts relating to the supply, diversion and use of water. Shall have general supervision of the appropriation of surplus or unappropriated water. May co-operate with the National Government. Shall have a seal and affix same to all certificates issued from his office.

§ 2165. (Sec. 7) Shall publish for not less than fifteen days, the date and place of beginning such surveys.

§ 2166. (Sec. 8) Duplicate plans of dams above 5 feet in height in beds of streams and above 10 feet in height in other places, shall be submitted to engineer for approval. He shall examine same and, if approved, returned one copy with approval; if disapproved, return same so noted. Has authority to keep an inspector on works during construction, and may order alterations needed to make perfectly safe. Failure to submit plans before beginning work, a misdemeanor.

§ 2167. (Sec. 9) Upon request of any person residing on or owning land in neighborhood of dam, engineer may order an examination. May cause the applicant to deposit fund to defray expenses, and if party not justified may require that he pay part or all of the expense. If request justified, may require owner of dam to pay part or all of expense.

§ 2168. (Sec. 10) Engineer may, during course of construction inspect ditches or other diverting works, and may order alterations to insure safety, and failure to comply with such orders is a misdemeanor. Sections 8, 9 and 10 not to apply to works constructed by National Government.

§ 2169. (Sec. 11) On completion of hydrographic survey engineer file written statement with clerk of district court of the counties embracing any part of such river system. Statement shall set forth completion of survey, the names and postoffice addresses of all parties using water of said system, and such other facts as he may deem necessary. On filing, the district court of county where filed shall have jurisdiction to determine all water rights on said river system.

§ 2170. (Sec. 12) Within 30 days after filing of statement, clerk of court shall give notice that all persons claiming the right to use the water of said system, must file with such clerk a written statement within 6 months after first publication of notice, setting forth their claim to the use of such water. Notice shall be published once a week for three successive weeks. Clerk of court shall mail by registered letter to each person whose name is given by engineer, a copy of notice, and form on which claim may be made.

§ 2171. (Sec. 13) Each person claiming right to use water from the river system, shall within six months after first publication, file with clerk of court a sworn statement, giving the name and address of claimant, the nature of use, flow per second, and time during each year when used, name of, and place on such source where diversion is made, the nature of the diverting works, date when first work was begun, and nature of such work, dimensions, grade, shape and nature of diverting works, date when original diverting channel was completed, date when water was first used, flow per second, time during which water was used first year, date and nature of each change made in original channel, and such other facts as will clearly define the extent and nature of the appropriation claimed. If the water is claimed for irrigation, statement shall show, in addition, the area irrigated first year and each subsequent year, total area at present irrigated, and its description, character of soil and nature of crops raised during first year, and the first year after each change in channel. If water claimed for

developing power, statement shall show the number, size and kind of water wheels used, head under which each wheel is operated, extent of power produced, purposes for which and places where used, and point where water returns to natural stream. If water claimed for mining, statement shall show, in addition, the name of the mine and mining district, nature of the material mined, place where water returns to natural stream. Within 60 days after expiration of 6 months, engineer tabulate facts contained in statements, a copy of which is filed with clerk of court, and another with the county recorder of each county embracing a part of such river system.

§ 2172. (Sec. 14) Clerk of court shall enter statement in a book, and file original marked with date of filing. Such filing considered notice of the claim of party making same. Failure to make and file statement, bars and estops from subsequently asserting rights theretofore acquired, and party held to have forfeited such previously acquired rights; provided that party on whom no other service than that made by publication is made, may apply to the court for permission to file statement, and time may be extended one year from date of first publication of notice, but before time is extended applicant shall give notice, by publication of the application, and make it appear to the court that he had no actual notice of the proceedings in time to appear and file a statement, and parties interested may present affidavits as to matter of actual notice.

§ 2173. (Sec. 15) Court may appoint a referee or referees not exceeding three, to hear and take testimony, and determine rights, as in equity cases. Any person may object to appointment of referee, for same causes as may be taken to a petit juror. Objection must be heard by judge, and affidavits may be used and witnesses examined on hearing.

§ 2174. (Sec. 16) Referees take oath, and have power to administer oaths.

§ 2175. (Sec. 17) The statements stand in place of pleadings and are referred to the referee, with all other files and papers. State engineer to furnish court or referee with any information he may possess.

§ 2176. (Sec. 18) Referee may allow statements to be amended. Court or referee to take testimony at such places within boundary of river system as may be convenient to claimants. Not less than fifteen days' notice of time and place of taking testimony to be given, by publication in paper of general circulation within river system. On day named, court or referee shall begin taking testimony and continue until taken; provided that a notice shall be served on a party the same as a summons fifteen days before the taking of testimony on his claim will begin. Court or referee may adjourn from time to time.

§ 2177. (Sec. 19) Any interested person may contest the claim of another by filing a written statement of his grounds of contest with clerk of court, within thirty days after the filing of the tabulation of facts as provided in sec. 13, the statement of contest to be verified by the party. Referees shall fix a time for hearing the contest, which shall not be less than 30 nor more than 60 days from the time when the notice is served on the party, service of which and return thereof shall be made in same manner as a summons.

§ 2178. (Sec. 20) Referee has power to issue subpœnas, which are served in same manner as subpœnas issued from the district court. Witnesses receive same fees as in district court.

§ 2179. (Sec. 21) On conclusion of testimony referee shall make findings of fact and law as to each claim and report same with a form of decree to the district court. Court may review report and enter decree thereon, or alter or modify same when necessary. Testimony taken by referee stenographically reported and filed with clerk or district court. Notice of filing of referee's report shall be given by clerk as the court may direct, and exceptions may be filed thereto by interested parties.

§ 2180 (Sec. 22) Decree determines and establishes the rights of claimants. Contents of decree given.

§ 2181. (Sec. 23) Decree may be appealed from within six months after entry.

§ 2182. (Sec. 24) Certificate of water right to be issued by clerk of court after entry of final decree, one copy thereof to be sent to claimant, who shall within 30 days file same with county recorder, and the other copy sent to state engineer.

§ 2183. (Sec. 25) Proceedings when judge or referee is claimant.

§ 2184. (Sec. 26) State engineer to divide state into water divisions, and subdivided into districts.

§ 2185. (Sec. 27) Superintendent of each water division appointed by the engineer with consent of governor, and hold his position at pleasure of engineer. A supervisor of each water district appointed by the county commissioners.

§ 2186. (Sec. 28) Superintendent has control of supervisors, and charge of distribution of water, and shall enforce the laws of the state and regulations of engineer.

§ 2187. (Sec. 29) Supervisor apportion water between ditches, so as to prevent waste.

§ 2188. (Sec. 30) Supervisor with consent of superintendent may employ assistants.

§ 2189. (Sec. 31) Appeals from decisions of supervisor or superintendent may be taken to state engineer by filing with engineer a statement of the injury.

§ 2190. (Sec. 32) Engineer fix compensation of superintendent.

§ 2191. (Sec. 33) Supervisor's compensation $3 per day to be paid by counties in his district, on filing itemized report approved by superintendent.

§ 2192. (Sec. 34) Rights to use unappropriated water may be acquired by appropriation, for some beneficial use, and first in time first in right.

§ 2193. (Sec. 35) Party to acquire right to use water, before commencing the diverting works, or enlargement, make application to engineer. For form and contents of application see *post.* §2233.

§ 2194. (Sec. 36) Action of state engineer thereon.

§ 2195. (Sec. 37) When filed in compliance with the act, engineer, at cost of applicant, paid in advance, shall publish notice of the application.

§ 2196. (Sec. 38) Any interested party at any time within 30 days after completion of publication file with engineer a written protest against granting the application, stating reasons therefor.

§ 2197. (Sec. 39) Applications to be filed and recorded in engineer's office, and when in proper form, and not in conflict with prior rights, or where proposed use will not impair existing rights, shall be approved, but where there is no unappropriated water or the use will conflict or impair existing rights, the engineer shall reject same.

§ 2198. (Sec. 40) The approval or rejection of engineer shall be endorsed on application, and a record of the endorsement made in his office. The application so endorsed shall be returned to applicant. If approved, applicant on receipt thereof is authorized to proceed; if rejected, the applicant shall take no further steps as long as the rejection is in force.

§ 2199. (Sec. 41) Before approval or rejection, engineer may require additional information.

§ 2200. (Sec. 42) In approving application engineer shall require that work of construction shall begin in six months, and completed within five years from date of approval. He may limit applicant to less time. Engineer for good cause may extend the time.

§ 2201. (Sec. 43) Aggrieved party may bring action in district court to adjudicate questions between applicant and protestant. Action must be brought in sixty days after notice of the action of the engineer; if not brought, the engineer shall proceed in accordance with his action. If an action brought, notice shall be filed with engineer, and he shall take no further action until matter determined. On final determination, copy of the decree shall be filed with engineer.

§ 2202. (Sec. 44) Upon completion of the diverting works applicant shall immediately make proof thereof by filing with engineer a statement of work done, sworn to by applicant and two disinterested witnesses. The statement shall be accompanied by a map profile and drawings on tracing linen. No certificate shall issue before proof is made, and a failure to make proof is a misdemeanor.

§ 2203. (Sec. 45) Upon it satisfactorily appearing to the engineer that the appropriation has been perfected in accordance with the application, he shall issue in duplicate a certificate, containing a detailed description of the appropriation, one copy of which shall be filed in the engineer's office, and the other delivered to the appropriator, who shall within 30 days record same in the office of the county recorder of the county where the water is diverted from the natural stream. The certificate shall be *prima facie* evidence of the appropriator's right to use the water mentioned therein.

§ 2204. (Sec. 46) The priority number of such appropriation shall be determined by the date of receiving the application at the office of the engineer.

§ 2205. (Sec. 47) Waters public property subject to existing rights to the use thereof.

§ 2206. (Sec. 48) Standard measurement of flow, one cubic foot per second, known as the second foot. Standard measurement of volume the acre-foot.

§ 2207. (Sec. 49) Beneficial use shall be the basis, the measure and the limit of all rights to the use of water in this state.

§ 2208. (Sec. 50) Right of eminent domain granted for rights of way for canals, ditches, reservoirs and other diverting and storage works.

§ 2209. (Sec. 51) Party desiring to convey water may enlarge the ditch or canal of another, by compensating the owner for any damage, and doing the work between the first days of October and March.

§ 2210. (Sec. 52) When appropriator abandons or ceases, to use water for a period of seven years, the right ceases, and such water reverts to the public. Questions of abandonment shall be questions of fact.

§ 2211. (Sec. 53) The place of diversion and use may be changed if done without impairing existing rights. Every change so made shall be reported to the engineer, accompanied by a map. Failure to make such report is a misdemeanor.

§ 2212. (Sec. 54) Water may be commingled and recovered, but the original quantity of water in such stream must not be diminished or impaired.

§ 2213. (Sec. 55) Appropriator must construct headgate and measuring device. Failure to do so is a misdemeanor.

§ 2214. (Sec. 56) Appropriators have priority among themselves according to the dates of their appropriations. Provided, that whenever the flow of any stream shall have receded in volume in the low-water stage, then the rights of all users to such flow at such stage shall be deemed to be equal as to priority, and the water when at or below such stage shall be apportioned *pro rata* among the users. But in times of scarcity, while priority of appropriation shall give the better rights as between those using the water for the same purpose, the use for domestic purposes shall have preference over use for all other purposes, and use for agricultural purposes shall have preference over use for any other purpose except domestic use.

§ 2215. (Sec. 57) Irrigation or reservoir companies, when permitted by the articles of incorporation, may purchase stock in other irrigation companies.

§ 2216. (Sec. 58) Ditches must be kept in repair.

§ 2217. (Sec. 59) When two or more are interested in the use of diverting or storage works, each shall be liable for his proportionate share of the cost of maintenance. On refusal to pay after demand in writing, party shall be liable in an action for contribution. In any company owning more than one ditch, the users of water shall not be required to pay any expense for any ditch other than the one they are directly interested in.

§ 2218. (Sec. 60) Water rights obtained through works constructed by the national Government shall become appurtenant to

specified land. If such water can no longer be profitably used on such land, it may be changed to other land, without losing priority of right, if the change can be made without detriment to existing rights, if the owner shall execute and acknowledge instrument showing such change, and record same in office of county recorder.

§ 2219. (Sec. 61) Water rights shall pass to the grantee of the land on which it has been used. If water has been used on two or three different parcels of land by the same owner, it will pass with the parcel on which it was last used, next preceding the transfer. The water right may be expressly reserved or it may be transferred separate from the land.

§ 2220. (Sec. 62) Water rights shall be transferred by deed, and recorded.

§ 2221. (Sec. 63) Deed of a water right must be recorded.

§ 2222. (Sec. 64) Persons interfering with diverting or storage works or with water officers, guilty of a misdemeanor, and also liable to the person injured by the unlawful act.

§ 2223. (Sec. 65) Obstructions to the right of way of and appropriator, forbidden.

§ 2224. (Sec. 66) The attorney general of the state and the district attorney of the district are legal advisers of the state engineer.

§ 2225. (Sec. 67) Fees of state engineer: For examining and approving plans and specifications for any dam, $1 for each and every foot in height of the dam to be built. If necessary to inspect the site, $10 per day and expenses shall be charged in addition. For inspecting any diverting works by request, $10 per day and expenses. For examining and filing applications to appropriate water, $2.50. For examining map, profile and drawings that are part of the proof of appropriation, $5.00. For approving and recording completed applications, $2.50. For issuing certificates of appropriation, each $1.00. For examining and filing notices of protest, $2.50. For filing any other paper, $1.00. For certified copy of any paper, per folio, twenty cents. For blue print copy of any map, profile drawing, per square foot, ten cents. For each certificate to copy of paper, drawing or map, fifty cents—provided that these provisions shall not apply to works constructed under supervision of the U. S. Reclamation Service.

§ 2226. (Sec. 68) State engineer has power to employ assistants and purchase equipment.

§ 2227. (Sec. 69) Fees of referees and stenographers shall be fixed by the court.

§ 2228. (Sec. 70) Plaintiff in any action to protect water rights may make all parties who use water from the same source parties. When damages are claimed in such action, they may be assessed and apportioned by the jury, and judgment entered thereon for one or all of the plaintiffs or against one or more of the defendants. In actions concerning joint water rights, or joint rights in water ditches, unless partition is asked, the court shall hear and determine the action as if same were several as well as joint.

§ 2229. (Sec. 71) The repeal of the irrigation district act does not affect existence of districts theretofore organized.

§ 2230. (Sec. 72) Dissolution of irrigation districts provided for.

§ 2231. (Sec. 73) The word "received" shall mean the date when such paper was first received at the engineer's office, and "filed" shall mean the date when such paper was completed and filed.

§ 2232. (Sec. 74) Repeal.

(c) *Forms.*

§ 2233. Application to Appropriate Water for Irrigation.

Before filling this blank, carefully read "Rules and Regulations" on the back hereof, and the notes in the body of it.

_____ 190__

For the purpose of acquiring the right to use a portion of the unappropriated water of the State of Utah, application is hereby made to the State Engineer, based upon the following showing of facts, submitted in accordance with the requirements of Chapter 108 of the Session Laws of Utah, 1905.

The purpose for which the water is to be appropriated is irrigation.

Note.—If it is intended to use the water for some purpose other than Irrigation, Power or Mining, strike out the line above this note and fill as many of the first fifteen blanks as are applicable and then state the purpose for which it is to be used, under the heading "Miscellaneous Purposes."

1. The name of the applicant is_____
2. The postoffice address of the applicant is_____
3. The flow of water to be used in cubic feet per second is_____
3*a*. The quantity of water to be appropriated is (See note under explanatory) _____acre-feet.
4. The water is to be used each year from (Month)_____(Day) to (Month)_____ (Day).
5. The water is diverted from (Name river system or drainage area)_____in_____County.
6. The particular point at which the water is to be diverted is described as follows:

Note.—If on a fork, branch, tributary or a feeder of said stream or source, or an isolated spring in its drainage area, name same and give course and distance of "point of diversion" or "point of issuance" of spring to some U. S. land corner, if within six miles of one; if not, to some prominent and permanent natural object_____

7. The diverting works will consist of_____
8. The cross-section of the diverting channel will be ⊔ ◡ or ○ (Strike out ones not needed.)
9. The nature of the diverting channel will be: earthen, wooden, iron or concrete. (Strike out ones not needed.)
10. The length of the diverting channel will be_____feet.
11. The top width of the diverting channel will be (if a flume or ditch)_____feet.
12. The bottom width of the diverting channel will be (if a flume or ditch)_____feet.
13. The depth of water in the channel will be (if a flume or ditch)_____feet.

14. The diameter of the diverting channel will be (if a pipe) ------feet.

15. The grade of the diverting channel will be------feet per mile.

16. The legal subdivisions of the land to be irrigated are as follows:--------

Total area------acres.

17. The character of the soil in the above tract of land is------ and the subsoil is------

Miscellaneous purposes------

Explanatory Note.—Never use the blank 3*a* except when it is intended to store the water to be appropriated. In such cases the total quantity of water to be so stored should be given in acre-feet. The legal subdivision of land covered by the reservoir should be named, and the periods of time during which the water is to be stored and released should be given in the space below. If the water is released from the reservoir into the natural channel of the stream, the point where it is diverted from such stream should be described in blank No. 6, and the data given in blanks 7-15 inclusive should be relative to the works used to divert the water from the natural channel. All other works should be described under "Explanatory" except where the water is not stored in the natural channel of the stream supplying it. In such cases the "point of diversion" is the place where the water is taken from the supplying source and should be described in blank No. 6, and blanks 7 to 15 inclusive should be used to describe the diverting works.

The following additional facts are set forth in order to more clearly define the full purpose of the proposed application------

----
(Signature of Applicant.)

Application to appropriate water. State Engineer's endorsements.

Dates:

----------Application receievd at State Engineer's office.
----------Application examined and ----------
----------Application returned for correction by----------
----------Corrected application received by----------
----------Corrected application examined and----------
Reason for returning application----------
Reason for rejecting application----------

This application is approved on condition and it is hereby required that actual construction work shall begin within six months and be fully completed within----from the date of approval hereof.

State Engineer.

State Engineer's Memoranda.

Dates:

----------Fee for filing application paid $----------
----------Fee for recording and approving application paid $-----
----------Proof of appropriation made----------
----------Fee for filing proof of appropriation paid $----------
----------Proof of appropriation examined and ----------
----------Proof of appropriation returned for correction by-----
----------Corrected proof of appropriation received by---------
----------Corrected proof of appropriation examined and-------

----------Time for completing works extended to----------
----------Fee for issuing certificate of appropriation paid $-----
----------Certificate of appropriation issued (No.---------)
----------Cost of publishing notice deposited $----------
----------Publication began and was completed----------
----------Notice published in----------
Application protested by----------

I hereby certify that the foregoing is a true copy of the application made by-----to appropriate water and of the endorsements therein as shown by the records of my office.

State Engineer.

Salt Lake City, Utah,------190--

§ 2234. Application to Appropriate Water for Mining.

----------190--

For the purpose of acquiring the right to use a portion of the unappropriated water of the State of Utah, application is hereby made to the State Engineer, based upon the following showing of facts, submitted in accordance with the requirements of Chapter 108 of the Session Laws of Utah, 1905.

The purpose for which the water is to be appropriated is mining.

Note.—If it is intended to use the water for some purpose other than Irrigation, Power or Milling, strike out the line above this note note and fill as many of the first fifteen blanks as are applicable and then state the purpose for which it is to be used under the heading "Miscellaneous Purposes." (The first 15 blanks of this form are identical with first 15 blanks in §3333 *supra*.)

16. The water will be used in------mining district, at the----mine, where the following ores or materials are mined:------

17. The particular purpose for which the water is to be used is------- This use will consume-------second feet of the water and------second feet of it will be returned to the natural stream or source at a point (see note under No. 5)------

(The remainder of this blank is the same as §3333 *supra*.)

§ 2235. Application to Appropriate Water for Power.

----------190--

For the purpose of acquiring the right to use a portion of the unappropriated water of the State of Utah, application is hereby made to the State Engineer, based upon the following showing of facts, submitted in accordance with the requirements of Chapter 108 of the Session Laws of Utah, 1905.

The purpose for which the water is to be appropriated is Power.

Note.—See §3334 *supra*.

(The first 15 blanks of this form are identical with first 15 blanks in §3333 *supra*.)

16. The number of wheels employed in the development of power will be------

17. The size of the wheels will be------inches.

18. The make of the wheels will be------

19. The wheels will operate under a head of------feet.

20. A total of------horsepower will be produced.

21. The power thus produced will be used for electric lighting and propelling machinery at------, Utah.

22. After having passed through said wheels, the water will be returned to the natural stream or source at a point described as follows: (See note under No. 6)_____

(The remainder of this form is the same as §3333 *supra*, after blank No. 17.)

CHAPTER 48.

WASHINGTON—CONSTITUTIONAL PROVISIONS, STATUTES AND FORMS.

(*a*) *Constitutional Provisions.*

§ 2236. (Art. XXI, Sec. 1) The use of the waters of this state for irrigation, mining and manufacturing purposes shall be deemed a public use.

(*b*) *Statutes.*

PIERCES' CODE 1905, P 1003.

§ 2237. (Sec. 5815) Any person entitled to take from natural streams or lakes, water not heretofore appropriated for purposes of irrigation.

§ 2238. (Sec. 5816) Riparian owners entitled to use water of stream, not otherwise appropriated for irrigation, to the full extent of the soil for agricultural purposes.

§ 2239. (Sec. 5817) Land owner entitled to right of way over lands between him and stream or lake, to obtain water for irrigation.

§ 2240. (Sec. 5818) Such right of way extends only to ditch sufficient for purposes, together with right of ingress and egress to construct, maintain and repair.

§ 2241. (Sec. 5819) If owner refuses right of way, same may be condemned.

§ 2242. (Sec. 5820) When flow of stream insufficient to supply the wants of country through which it flows, Judge of Superior Court appoint three commissioners to apportion water in just and equitable manner, a certain amount thereof to be allotted on alternate days in certain localities with due regard to legal rights of all.

§ 2243. (Sec. 5821) Persons owning land in vicinity of stream or lake not abutting thereon, may take water if there be any surplus or unappropriated water therein.

§ 2244. (Sec. 5822) Such persons entitled to right of way for ditch and may condemn same.

§ 2245. (Sec. 5823) In case flow of water is below the usual flow, any interested person may apply to Superior Court and Court shall appoint three commissioners to distribute water, to the persons entitled to its use, having due regard for vested rights; Pro-

vided, that water for domestic purposes shall be allowed before any is apportioned for irrigation, and in case of unusual drought commissioners shall endeavor to save orchards and perennial plants.

§ 2246. (Sec. 5824) The vested right to water shall be based and determined by the usual flow of water in the stream, and when the flow is unusually low, the rights shall be reduced in proportion.

§ 2247. (Sec. 5825) Person desiring to construct ditch, entitled to take water from stream not theretofore appropriated, not in excess of quantity required for irrigation.

§ 2248. (Sec. 5826) Upon application Superior Court appoint three commissioners to investigate extent of use, and order diversion reduced to quantity necessary for use intended.

§ 2249. (Sec. 5827) The natural channel may be used to convey water, subject to deduction for loss by seepage and evaporation, to be determined by the commissioners.

§ 2250. (Sec. 5828) Water wheel may be placed on stream to raise water.

§ 2251. (Sec. 5829) Ditches constructed to utilize waste or seepage, subject to same law as other ditches; provided, person on whose lands such water rises, entitled to prior right thereto if he can utilize it.

§ 2252. (Sec. 5830) Person whose land has been irrigated by overflow, shall in case of reduction of flow, have right to construct ditch, to irrigate such lands, such ditch to have priority same as though built when lands first irrigated by overflow.

§ 2253. (Sec. 5831) When ditch does not receive full flow to which it is entitled the water flowing therein to be apportioned *pro rata* among all the users of water therefrom.

§ 2254. (Sec. 5832) Person having right to water from artesian well has right of way for ditch to conduct water, and may condemn same.

§ 2255. (Sec. 5833) The word "person" construed to mean a natural person, an association, corporation or "persons"; "he" means she, it or they; "ditch" means dyke, flumeway and irrigating canal.

§ 2256. (Sec. 5834) Owner maintain embankments, and construct tail ditch to return water to stream after use.

§ 2257. (Sec. 5835) Bridging public roads.

§ 2258. (Sec. 5836) The limit of the use is the quantity absolutely necessary for the irrigation of the land, Violation of this section a misdemeanor.

§ 2259. (Sec. 5837) Owner erect and maintain headgate.

§ 2260. (Sec. 5838) Owner liable for damages resulting through neglect to comply with provisions of act.

§ 2261. (Sec. 5839) "Owner" means owners, or persons having charge or control of ditch and liable as owner.

§ 2262. (Sec. 5840) Counties constitute water districts. County Commissioners appoint water commissioners.

§ 2263. (Sec. 5841) Water commissioners take oath and file bond.

§ 2264. (Sec. 5842) Water commissioners divide water among the ditches where there is an average volume of water in the stream, shut and fasten headgates, of those not entitled to water by reason of the priority rights of others.

§ 2265. (Sec. 5843) Tampering with ditches misdemeanor; fine not less than $50 nor more than $500, or imprisonment not less than 30 days nor more than 6 months, or both.

§ 2266. (Sec. 5844) Water commissioner receive $4 per day not to exceed 120 days each year.

§ 2267. (Sec. 5845) Water commissioner may employ assistants, who shall take oath, obey his instructions and receive $3 per day.

§ 2268. (Sec. 5846) Water commissioner not begin work until called on by two or more owners of ditches in his district.

§ 2269. (Sec. 5847) Water commissioner to keep register showing the priority rights ascertained from court records or other legal source.

§ 2270. (Sec. 5848) Right of eminent domain for construction of ditches granted.

§ 2271. (Sec. 5849) Petition filed in Superior Court, describing lands to be crossed, the ditch, and quantity of land needed, the names of the owners, court causes to be published for 10 days before hearing a notice of the time and place of such hearing, and on hearing appoint three appraisers.

§ 2272. (Sec. 5850) Oaths and duties of appraisers.

§ 2273. (Sec. 5851) Rights of way acquired as above provided, for conduits.

§ 2274. (Sec. 5852) Must keep conduits in repair.

§ 2275. (Sec. 5853) No land burdened with two or more ditches where one will do.

§ 2276. (Sec. 5854) The shortest and most direct route to be selected.

§ 2277. (Sec. 5855) In case natural channel changes so that ditch cannot obtain its supply of water, the ditch may be extended and right of way for extension condemned.

§ 2278. (Sec. 5856) Within 90 days after the construction or enlargement of any ditch, owner must file in office of county clerk a map and statement, showing same things required in Colorado. *Ante*, §409, *et seq.*

§ 2279. (Sec. 5857) This act applies only to ditches carrying water for irrigation.

§ 2280. (Sec. 5858) Person desiring to condemn riparian rights file petition in Superior Court of county wherein the stream or lake or any portion thereof is situated setting forth the uses to which the water is to be put, and the amount to be taken.

§ 2281. (Sec. 5859) If petition shows that water is to be used for irrigation Court shall direct that notice be given to all persons concerned by publication, and posting in five places along stream fixing the time and place of hearing the petition.

§ 2282. (Sec. 5860) Persons having rights to the waters of of such stream or lake desiring to maintain them, shall appear and present claim, failure to appear is waiver of all claims.

§ 2283. (Sec. 5861) Court shall hear and determine claims.

§ 2284. (Sec. 5862) Three appraisers to be appointed to fix value of rights to be taken.

§ 2285. (Sec. 5863) Appraisers file report as soon as possible.

§ 2286. (Sec. 5864) Court may set aside report for irregularities.

§ 2287. (Sec. 5865) If parties object to report, case set for trial.

§ 2288. (Sec. 5866) Jury assess damages separately on each claim, each party may appeal.

§ 2289. (Sec. 5867) Party excepting to appraisement, not entitled to recover costs, unless he succeeds in changing amount.

§ 2290. (Sec. 5868) If appraisers fail to make report Court may appoint others.

§ 2291. (Sec. 5869) Water companies may condemn right of way for ditch to furnish water to others for irrigation. Same proceeding as Sec. 5848, *supra*.

§ 2292. (Sec. 5870) Such water company is a common carrier.

§ 2293. (Sec. 5871) The right to condemn is limited to the riparian rights, and does not extend to the rights of others for water used by them for irrigation.

§ 2294. (Sec. 5872) Injury to plant described and penalties fixed.

§ 2295. (Sec. 5873) Provides for adjudication of claims in existence on or before June 1st, 1890.

§ 2296. (Sec. 5874) Any person interested as owner may petition superior court to adjudicate rights of priority in a water district. Court shall proceed if practicable in open court to adjudicate and establish rights, and clerk issue a certificate to the appropriator.

§ 2297. (Sec. 5875) Certificates to be recorded in records of the county and exhibited to water commissioner who shall enter an abstract thereof in a book kept by him for that purpose.

§ 2298. (Sec. 5876) Clerk publish notice of hearing on adjudication.

§ 2299. (Sec. 5877) Costs.

§ 2300. (Sec. 5878) Parties moving adjudication serve notices.

§ 2301. (Sec. 5879) Court in making decree number ditches.

§ 2302. (Sec. 5880) United States may avail itself of the provisions of this law.

§ 2303. (Sec. 5899) Sheriff to enforce decree of court fixing rights of priority, when requested by three or more persons, or ordered by the court.

§ 2304. (Sec. 5900) Sheriff and deputies paid by county for services hereunder.

§ 2305. (Sec. 5901) Headgate to be constructed and maintained by ditch owner.

§ 2306. (Sec. 5902) Failure a misdemeanor.

§§ 2307-2314. (Secs. 5903-5903*g*) An act relating to the appropriation of waters of the state for irrigation purposes, granting to the United States the right to exercise the power of eminent domain in acquiring lands, water and other property for rights of way, and for reservoirs and other irrigation works, granting to the United States certain rights in state lands and in the waters of the state, relating to water users' associations, and declaring an emergency. Approved March 4th, 1905, Laws '05, ch. 88.

§§ 2315-2333. (Secs. 5904-5904*r*) An act providing for the irrigation, improvement and sale of lands granted to the State of Washington for any and all purposes and uses. Approved March 3, 1905, Laws '05, ch. 61. Incorporated Irrigation Districts "Wright Act."

§§ 2334-2413. (Secs. 5736-5814) Provide for the creation of incorporated irrigation districts, the inclusion and exclusion of lands, the confirmation of bond issues by court proceedings, and are very similar to those of California and Colorado, *supra*.

(5881-5898) Provide for the dissolution of incorporated irrigation districts.

(*c*) *Forms.*

§ 2414. No forms from the State of Washington were obtainable.

CHAPTER 49.

WYOMING—CONSTITUTIONAL PROVISIONS, STATUTES, AND FORMS.

(*a*) *Constitutional Provisions.*

§ 2415. (Art. I, Sec. 31) Water being essential to industrial prosperity, of limited amount and easy of diversion from its natural channels, its control must be in the State, which, in providing for its use, shall equally guard all the various interests involved.

§ 2416. (Art. VIII, Sec. 1) The water of all natural streams, springs, lakes, or other collections of still water, within the boundaries of the State, are hereby declared to be the property of the State.

§ 2417. (Sec. 2) There shall be constituted a Board of Control to be composed of the State Engineer and Superintendents of the Water Divisions, which shall, under such regulations as may be prescribed by law, have the supervision of the waters of the State, and of their appropriation, distribution and diversion, and of the various officers connected therewith, its decisions to be subject to review by the courts of the State.

§ 2418. (Sec. 3) Priority of appropriation for beneficial uses shall give the better right. No appropriation shall be denied except when such denial is demanded by the public interests.

§ 2419. (Sec. 4) The Legislature shall by law divide the State into four water divisions and provide for the appointment of Superintendents thereof.

§ 2420. (Sec. 5) There shall be a State Engineer, who shall be appointed by the Governor of the State and confirmed by the Senate; he shall hold his office for the term of six years, or until his successor shall have been appointed and shall have qualified; he shall be President of the Board of Control and shall have general supervision of the waters of the State, and of the officers connected with its distribution. No person shall be appointed to this position who has not such theoretical knowledge and such practical experience and skill as shall fit him for the position.

§ 2421. (Art. XIII, Sec. 5) Municipal corporations shall have the same right as individuals to acquire rights, by prior appropriation and otherwise, to the use of water for domestic and municipal purposes, and the Legislature shall provide by law for the exercise upon the part of incorporated cities, towns and villages of the right of eminent domain for the purpose of acquiring from prior appropriators, upon the payment of just compensation, such water as may be necessary for the well-being thereof and for domestic uses.

(*b*) *Statutes.*

Revised Statutes 1899.

§ 2422. (101) State engineer take oath and file $5000 bond with not less than two sureties. Shall have theoretical knowledge and practical skill and experience fitting him for position.

§ 2423. (102) Salary $2500 per annum.

§ 2424. (103) Office in the Capitol Building.

§ 2425. (104) Shall make measurements and calculations of discharge of streams, commencing on streams most used for irrigation or other beneficial purposes. Collect facts and make surveys to determine most suitable location for works to utilize waters of the state. Examine reservoir sites and keep in his office records of his work and observations.

§ 2426. (105) May employ assistants.

§ 2427. (106) Entitled to actual traveling expenses when away from his office on state business.

§ 2428. (107) Report to Governor biennially.

§ 2429. (108) The state engineer shall receive following fees, payable in advance:

For filing and examining applications for permits to appropriate water, and maps of same, $2.00.

For recording any water right instrument not specified above, $1.00 for the first 100 words, and for each additional folio, 15c.

For issuing certificates of appropriation of water, $1.00; provided, that said fee of one dollar shall be by each appropriator or claimant paid to the Water Division Superintendent at the time of

the submission of the testimony and proof of appropriation of water by such appropriator or claimant, before the said Division Superintendent, as by law provided, which said fee shall be by said Superintendent immediately turned over to the said State Engineer and his receipt taken therefor and filed in the records of the Board of Control.

For making certified copies of any document recorded or filed in the State Engineer's office, $1.00 for the first folio and 15c. for each subsequent folio, and for each certificate attached thereto, $1.00.

§ 2430. (109) All fees shall be paid by the Engineer into the general fund.

§ 2431. (848) Water divisions defined.

§ 2432. (849) One superintendent for each water division, appointed by the governor, with the consent of the senate, for term of four years.

§ 2433. (850) Superintendent shall have immediate direction and control of the water commissioners, and of the distribution of water in his division and perform duties devolving on him as a member of the board of control.

§ 2434. (851) Superintendent may make regulations supplementary to and necessary to enforce the general laws, relative to the distribution of water.

§ 2435. (852) Parties may appeal from decision of superintendent to state engineer by filing with the engineer a copy of the order or regulation complained of, and a statement of the injury. Engineer after notice shall hear testimony either oral or by affidavit, and may through the superintendent suspend, amend or confirm the order.

§ 2436. (853) Water commissioners report to superintendent, showing the amount of water necessary to supply all ditches, canals and reservoirs; whether the supply is on the increase or decrease; what ditches are without their proper supply at that time, and the probability as to what the supply will be during the period before the next report.

§ 2437. (854) Superintendent file such reports and from them ascertain what ditches are and what not receiving their proper supply of water; and if it shall appear that in any division of that district any ditch is receiving water whose priority post-dates that of the ditch in another district, as ascertained from his register, he shall at once order such post-dated ditch shut down, and the water given to the elder ditch, his orders being directed at all times to the enforcement of priority of appropriation, according to his tabulated statement of priority, to the whole division, and without regard to the district within which the ditches may be located. The reports of the water commissioners shall be filed and kept in the office of the state engineer.

§ 2438. (855) Amended Sess. L, '03, ch. 41, p. 36. Salary of superintendents $1200 per annum.

§ 2439. (856) Superintendents take oath and file $2500 bond.

§ 2440. (857) Board of Control, composed of State Engineer, and Superintendents of water divisions, created. Office with State

Engineer, shall hold two meetings each year, second Wednesday in March and third Wednesday in October. Engineer *ex-officio* president of board, with right to vote on all questions.

§ 2441. (858) Amended Sess. L. '03, ch. 41, p. 37. Board has power to appoint with power of removal, a secretary whose salary is $1200 per annum.

§ 2442. (859) Duty of board at its first meeting.

§ 2443. (860) Streams to be first adjudicated.

§ 2444. (861) Board prepare notice setting forth the date and place when and where the state engineer will begin the measurement of streams and ditches, and a day and place when and where the superintendent shall begin the taking of testimony as to the rights of the parties taking water therefrom. The notice shall be published in two issues of a newspaper having general circulation in the county in which such stream is situated, the publication to be at least 30 days prior to the taking of any testimony or the measurement of streams or ditches. Superintendent has power to adjourn from time to time and place to place.

§ 2445. (862) Similar notice to be mailed by superintendent to each party having a recorded claim to the waters of such stream.

§ 2446. (863) Statement of claimant. See *post* §2564, form of Proof of Appropriation of Water.

§ 2447. (864) Statements to be under oath.

§ 2448. (865) At the time and place named in notice Superintendent shall begin the taking of testimony. In taking proofs of appropriation under permits issued after the stream has been adjudicated, the Superintendent may authorize the Water Commissioner to take such proofs. The Water Commissioner shall only take such proofs as are specified by Superintendent and forward same at once to Superintendent, collecting the same fees as the Superintendent is required to collect.

§ 2449. (866) Upon completion of taking of proofs, Superintendent shall give notice in one issue of a newspaper of general circulation of a time and place where he shall open the evidence for inspection for not less than one day nor more than five days.

§ 2450. (867) Any person desiring to contest the claim of another shall within 15 days after the testimony has been open for inspection, in writing notify the Superintendent, stating the grounds of the proposed contest, which statement shall be verified, and the Superintendent shall notify the contestant and the person whose rights are contested to appear before him at some convenient time and place.

§ 2451. (868) The Superintendent shall fix the time and place, both as to day and hour, for hearing the contest, not less than 30 nor more than 60 days from the date of service of notice, the notice to be served and returned in same manner as summons issued out of the district court. Hearings may be adjourned from time to time and Superintendent may issue subpœnas, and has power to compel attendance of witnesses. The evidence shall be confined to the subjects enumerated in the notice of contest.

§ 2452. (869) Superintendent shall require a deposit of $8.00 per day from each party, the successful party receiving back his deposit after determination of contest.

§ 2453. (870) Upon completion the evidence shall be transmitted by the Superintendent to the office of the board of control.

§ 2454. (871) State engineer to measure streams and ditches.

§ 2455. (872) Board of Control at first meeting make order determining priorities.

§ 2456. (873) Certificate of appropriation to be issued by board. Certificate to be transmitted to the county clerk of the county in which the appropriation was made, for record, and thereafter it shall be transmitted to the appropriator.

§ 2457. (874) An appeal may be taken from the board to the district court of the county in which the stream may be situated.

§ 2458. (875) Party appealing shall within 60 days of the determination of the board of control and the entry thereof in the records of the board, file in the district court to which an appeal is taken, a notice in writing stating that such party appeals to such court from the determination and order of the board of control; and upon filing of such notice the appeal shall be deemed to be taken. The party shall within such 60 days enter into an undertaking to be approved by the district court or the judge thereof, and to be given to all parties in the proceeding other than the parties appealing in such an amount as the court or judge may fix, conditioned for the prosecution of the appeal and payment of all costs and damages.

§ 2459. (876) Clerk of court on filing of notice of appeal and bond, shall transmit to the secretary of the board of control a notice to the effect that the appeal has been perfected, and appellant shall cause a certified copy of such notice to be served, in the same manner as a summons, on the appellees.

§ 2460. (877) Appellant shall within 6 months after the appeal is perfected, file in the office of the clerk of court a certified transcript of the order of the board, a certified copy of all records of the board, and of all evidence offered, including the measurements of streams and ditches, together with a petition setting out the cause of complaint of the party appealing and all parties named as appellees shall be served with summons in manner and time as provided for issuance and service of summons.

§ 2461. (878) No pleadings necessary, and proceedings on appeal governed by civil code.

§ 2462. (879) Clerk of court shall transmit transcript of judgment to board of control.

§ 2463. (880) Party defeated on appeal shall pay costs.

§ 2464. (881) Proceedings under the order of the board of control may be stayed by filing a bond in the district court, conditioned for the payment of all damages caused by not enforcing such order.

§ 2465. (882) Appeals shall be advanced on the docket.

§ 2466. (Sess. L. '03, p. 132) Duty of clerks of court as to judgments in water right cases.

§ 2467. (883) After any final order of the board of control any party may apply for a rehearing within one year thereafter, for reasons to be stated in the application.

§ 2468. (884) On rehearing board may modify order and correct testimony.

§ 2469. (885) Members of board authorized to administer oaths in performance of their duties.

§ 2470. (886) Who to be notified in adjudication proceedings.

§ 2471. (887) Amended Sess. L. '05, ch. 26. Fees of the secretary of the board.

§ 2472. (Sess. L. '01, p. 70, Sec. 1) The final orders of the board in adjudication proceedings, shall be final and conclusive as to all prior appropriations, and the rights of all existing claimants upon the stream or other body of water embraced in the adjudication, subject to the provisions of the laws relating to rehearings, reopenings and appeals.

§ 2473. (Sec. 2) Whenever the board shall proceed to adjudicate the rights to use of water from any stream, it is the duty of claimants to appear at the time and place specified in the notice and submit proof of their appropriations; and any such claimant who shall fail to appear and submit such proof, shall be barred and estopped from subsequently asserting any rights theretofore acquired on the stream, and shall be held to have forfeited all rights to the use of said stream. Parties having failed to appear at former adjudications, allowed one year from the passage of the act, to submit proof. Person upon whom no service other than the publication in the newspaper was served, may appear within one year after the entry of the decree by the board and have same reopened and submit proof.

§ 2474. (Sec. 3) Any person claiming the right to use water, who failed to appear in any adjudication of said stream heretofore held, may within one year after passage of this act, file a petition for rehearing before the board.

§ 2475. (Sess. L. '03, p. 121, Sec. 1) Proof of adjudication when records show that the rights were not adjudicated in one and the same proceeding, to be opened for inspection by the board of control. Parties may contest, as hereinbefore provided.

§ 2476. (Sec. 2) Testimony in such contest to be transmitted to the board. If necessary, as a result of such contest, the board may cancel a certificate theretofore issued, and issue without cost a new one, in accordance with the result of the contest.

§ 2477. (888) State divided into water districts by the board of control.

§ 2478. (889) Water Commissioner for each district to be appointed by the Governor, on recommendation of the Superintendent. He shall hold office for two years.

§ 2479. (890) Water Commissioner shall divide the water in the streams of his district among the users thereof according to the prior rights of each. Shall shut and fasten under the direction of the Superintendent the headgates of ditches, whenever it is necessary to do so by reason of the prior rights of others.

§ 2480. (891) Water Commissioners shall prevent waste. Any party aggrieved or injured by the action of the water commissioner may appeal to the superintendent, and from his decision to the state engineer, and from the decision of the latter to the district court.

§ 2481. (892) Water Commissioners shall receive $5.00 per day, to be paid by the county in which the work is performed. Shall keep a correct account of time, and upon approval of the Superintendent the County Commissioners shall pay same.

§ 2482. (893) Water Commissioners may in times of emergency employ assistants, who shall receive $4.00 per day.

§ 2483. (894) Commissioners begin work when called upon in writing by two or more appropriators, owners or managers of ditches. May commence at the call of one appropriator if the reasons given appear sufficient.

§ 2484. (895) Limitation on the use of water.

§ 2485. (896) Repealed.

§ 2486. (897) Land owner entitled to right of way for ditch, upon the payment of damages.

§ 2487. (898) Right of way shall extend only to a ditch, dyke or cutting sufficient for the purposes required.

§ 2488. (899) Party seeking right of way shall file a petition with the county commissioners asking the appointment of appraisers and the commissioners shall give 30 days' notice of the time when the appraisers will be appointed.

§ 2489. (900) Appraisers shall take oath, and hear the proofs and allegations of the parties, and any two of them, after viewing the premises, shall ascertain and certify the compensation proper to be paid, for the taking of the land, as well as damages accruing by reason of the taking of same.

§ 2490. (901) Ditches to be kept in repair.

§ 2491. (902) Vested rights preserved.

§ 2492. (903) When commissioners to bridge ditches—expenses.

§ 2493. (904) Claim for right of way may be arbitrated.

§ 2494. (905) The owner of the land, and the party desiring to construct the ditch, shall each select one arbitrator, and these two the third. It shall be competent for any two to assess the damages.

§ 2495. (906) An appeal may be taken from the decision of the arbitrators within ten days, in writing, to the board of county commissioners. Party taking the appeal shall give bond for costs. The case then stands as though no arbitration had been had, and the proceedings hereinbefore provided are taken.

§ 2496. (907) If no appeal is taken the award of the arbitrators is final.

§ 2497. (908) The district court may appoint a person to distribute the water in partnership ditches.

§ 2498. (909) Upon the filing of the petition seeking the appointment of such person, the clerk of the court shall issue sum-

mons to the owner or owners other than the petitioner, requiring them to appear within five days, and answer the petition, provided the summons shall be served two days before the date fixed therein.

§ 2499. (910) Amended Sess. L. '03, p. 122. The hearing on such petition may be had before the court, the judge or the court commissioner, on the day fixed or as soon thereafter as possible. The decision shall be final unless an appeal is taken to the district court of the county, in the same manner as appeals from the justice of the peace. The judge or court commissioner shall fix the undertaking on appeal according to the value of the property.

§ 2500. (911) The court, judge or commissioner shall on proper showing appoint a person who shall have exclusive control of the ditch for the purpose of dividing and distributing the water until removed.

§ 2501. (912) The person so appointed shall render monthly statements to the court, judge or court commissioner, of his services and expenses, and at the next term of court, judgment shall be rendered against those owners of said ditch who fail to pay their *pro rata* share thereof.

§ 2502. (913) Compensation $3.00 per day. May file with county clerk the itemized statement allowed as above, with an affidavit showing the unpaid portion, which shall be a lien against the interest of the owner in default.

§ 2503. (914) Fees of the clerk of court, court commissioner and sheriff.

§ 2504. (915) If a co-owner of a ditch fails to perform his share of the work to properly maintain a ditch, the others may, after ten days' notice in writing, perform the work and collect the value thereof in any court of competent jurisdiction.

§ 2505. (916) If such co-owner fails to pay such share within 30 days after receiving a statement thereof, an itemized statement sworn to, may be filed with the county clerk, and become a lien on the interest in such ditch, of the owner in default.

Procedure Relative to Appropriation of Water.

§ 2506. (917) Person desiring to appropriate water must file with the state engineer an application stating the things shown in the form *post* §2562.

§ 2507. (918) Duty of the state engineer.

§ 2508. (919) Approval of application by state engineer.

§ 2509. (920) The refusal or approval shall be endorsed on application, and returned to applicant. If approved, the applicant is authorized to proceed with the construction of the works. If refused, he shall take no further steps as long as the refusal is in force.

§ 2510. (921) State engineer may require additional information before acting on the application.

§ 2511. (922) The state engineer shall endorse on the application a requirement that the work shall begin within one year and be completed within five years, and may allow less time. The state engineer may, for good cause shown, extend the time.

§ 2512. (923) Applicant may appeal from decision of engineer to the board of control and from the board's decision to the district court. Appeal shall be taken within 60 days from the issuance of the board's order, and be perfected, when a certified copy of the order appealed from together with a petition setting forth the cause of the appeal is filed.

§ 2513. (924) Applicant for a permit must file a map or plat in duplicate showing location and extent of the proposed work, drawn on tracing linen, on a scale not less than two inches to the mile, which must show the location of the point of diversion, the course of the ditch, and wherever section lines are crossed the distance to the nearest corner, the location and area of the lands proposed to be irrigated, the location of all ditches crossed, all reservoirs and their area, and the map shall contain the name of the owner, and a certificate from the surveyor, giving the date of the survey.

§ 2514. (925) Engineer must examine maps.

§ 2515. (926) The Engineer may require additional description of ditches carrying more than fifty feet of water.

§ 2516. (927) The Engineer may require additional plans.

§ 2517. (928) Upon its appearing to the satisfaction of the board of control that the appropriation has been perfected in accordance with such application, a certificate shall issue as in section 873, *supra* §2457, provided.

§ 2518. (929) The priority of such appropriation shall date from the filing of the application in the office of the state engineer.

§ 2519. (930) The appropriator shall construct and maintain a headgate and a flume or measuring device. Upon refusal of the appropriator the water commissioner shall shut the ditch, and no water shall be permitted to run therein until the orders of the superintendent are complied with.

§ 2520. (931) Duplicate plans of any dam across a stream above five feet in height, or intended to retain water above ten feet in height, shall be submitted to the engineer for his approval, and it is unlawful to construct such dam until such approval.

§ 2521. (932) Engineer's authority to inspect.

§ 2522. (933) Should any person residing on or owning land in the neighborhood of any irrigation works, apply in writing to the engineer desiring an inspection of such works, the latter may order an inspection thereof. Before doing so he may require applicant to deposit sufficient to pay the expense, and if the inspection was not needed he may use the deposit for such purpose. If the inspection is justified, he may require the owner to pay for inspection, to be collected in same manner as for the headgates.

Reservoirs—Sess. L. '03, p. 74.

§ 2523. (Sec. 1) Person desiring to construct a reservoir, shall make application to State Engineer for permit. See form *post* §2563.

§ 2524. (Sec. 2) Authority of State Engineer.

§ 2525. (Sec. 3) Whenever the owner of a reservoir shall desire to use the bed of a stream, or watercourse, for the purpose of carrying stored water, he shall in writing notify the Water Commissioner of the district in which the water is to be used, giving the date when it is proposed to discharge the water, its volume in acre-feet, and the persons and ditches entitled to its use. The commissioner shall then adjust the headgates of all ditches not entitled to the stored water, as will enable those having the right, to secure the volume to which they are entitled. The Commissioner shall keep account of his time and expense, and the county commissioners shall present a bill for one-half thereof to the owner of the reservoir, and on failure to pay same it shall be a charge on the reservoir, collectible as taxes.

§ 2526. (Sec. 4) Assistant engineer appointed when.

§ 2527. (Sec. 5) State Engineer shall estimate costs of superintendence.

§ 2528. (Sec. 6) Permit may be cancelled when.

§ 2529. (Sec. 7) The use of stored water may be obtained on such terms as shall be agreed upon between the parties in interest.

§ 2530. (Sec. 8) The priority of right to store water shall date from the filing of the application in the office of the State Engineer.

§ 2531. (Sec. 9) An acre-foot is a volume sufficient to cover one acre of land one foot deep, or 43,560 cubic feet.

Revised Statutes, 1899.

§ 2532. (1965) Amended Sess. L. '05, ch. 63. Flooding roads prohibited.

§ 2533. (942) Amended Sess. L. '05, ch. 79. The person making application to the board for the selection of lands by the state, shall have filed with the State Engineer an application for a permit to appropriate water for the reclamation of those lands, the application and maps to be in conformity with the sections relating to appropriation of water.

§ 2534. (955) The water rights to all lands acquired under the provisions of this chapter shall attach to and become appurtenant to the land as soon as title passes from the United States to the state.

§ 2535. (968) A cubic foot per second of time shall be the legal standard for the measurement of water in this state, both for the purpose of determining the flow of water in natural streams and for the purpose of distributing the water therefrom.

§ 2536. (969) County to pay expense of printing.

§ 2537. (970) Ditch owners to protect fish by means of screens. Failure to do so a misdemeanor.

§ 2538. (971) Interference with headgate a misdemeanor.

§ 2539. (972) Water commissioners and assistants have power to arrest, and turn offenders immediately over to the sheriff, and make complaint before the proper justice of the peace.

§ 2540. (973) Destroying water improvements a misdemeanor.

§ 2541. (974) Owners of reservoirs liable for all damage caused by leakage or overflow, or by floods caused by breaking embankments.

§ 2542. (976) Any ditch or irrigation company or association, all the property or capital stock of which is owned by farmers or others, owning lands under the line of such company's or association's ditch and receiving water therefrom, by reason of their being owners or stockholders in said company or association, shall have the right to levy and collect such annual assessments on the capital stock of said company, or members or owners of such association, whether said capital stock be fully paid up or otherwise, as may be deemed necessary by the trustees of said company, or a majority of the stock of such association, for the purpose of maintaining its ditches, flumes, tunnels, and the payment of all necessary expenses of such company: Provided, That this section shall only apply to such water companies or associations whose capital stock or ditch property is wholly owned by persons or corporations owning land under the line of their ditches, and using water therefrom by reason of being such stockholders in said companies: And Provided, further, That said company or association shall have the right to close the headgate and refuse water to all such stockholders, owners or members who fail or refuse to pay said assessments after ten days' notice thereof, in writing, made by the president, agent or attorney of said company or association.

§ 2543. (977) Vested rights preserved.

§ 2544. (1959) Owner of ditch must maintain bridge at road crossing. Violation of this provision a misdemeanor.

§ 2545. (3066) Three or more persons may incorporate ditch company.

§ 2546. (3067) Right of way for ditch company.

§ 2547. (3068) Ditch company shall sell water.

§ 2548. (3069) Ditch to be kept in good condition.

§ 2549. (3070) Ditch and water companies may issue bonds.

§ 2550. (3071) The foregoing sections apply to companies heretofore formed.

§ 2551. (Sec. 3084) Condemnation by ditch companies.

Sess. L. '03, *p.* 14.

§ 2552. (Sec. 1) Floating of timber in streams—Duty of owner.

§ 2553. (Sec. 2) Penalty

Transfer of Water Rights. Chap. 97, S. L., 1905.

§ 2554. (Sec. 1) No transfer of any water right from any lands upon which the water had heretofore been used to other lands shall be valid which shall be injurious to any prior or subsequent appropriator, or his assigns, not a party to the transfer.

§ 2555. (Sec. 2) Every transfer of water rights shall be by deed executed and acknowledged in the manner provided for the execution and acknowledgment of deeds to real estate, and shall be recorded in the office of the County Clerk of the county in which such water right is used as deeds to lands are recorded, and shall also be recorded in the office of the State Engineer of the State of Wyoming.

§ 2556. (Sec. 3) No member of the Board of Control, or a Water Commissioner, shall be required to take notice of such transfer until the deed of transfer shall have been recorded as aforesaid, and in all acres the Board of Control and Water Commissioners, if in their judgment the transfer is injurious to any person, not a party to the said transfer, shall have the right to refuse to recognize the same until the validity of such transfer shall have been established by the proper court. If such transfer is allowed by the irrigation officers, a public notice shall be given by publication in a paper having general circulation in the county where the transfer is made. Such publication shall be made at the expense of the party making the transfer.

§ 2557. (Sec. 4) In all cases where the Board of Control or Water Commissioner refuses to recognize any transfer and prevents the use of the water in accordance therewith, the person or persons owning such water right by such transfer shall have the right to bring an action of injunction to prevent the interference by such Board of Control or Water Commissioner with the use of the said water in accordance with the said transfer, which said action of injunction shall be prosecuted in all respects as other actions for injunction.

§ 2558. (Sec. 5) The said action of injunction shall be brought against the Commissioner or the member or members of the Board of Control interfering with the use of the said water right in accordance with the transfer, and notice thereof shall be given by publication in such newspaper and for such time as the court may require to all appropriators of water upon the stream involved. It shall be the duty of the Attorney General of the State to appear for and defend the irrigation officials in all cases where they are made a party to any court proceedings. Any appropriator shall have the right to intervene in the said action, with full right by appropriate pleadings and evidence to have his rights in relation to the said transfer fully determined; and in case any injunction has been granted which is thereafter found to have been wrongfully obtained, any such intervener who has in any wise suffered from the said injunction shall have the same right to prosecute his action for damages upon the bond given in obtaining said injunction as if he had been originally made a party to the said action and mentioned in the said injunction bond.

§ 2559. (Sec. 6) Any person aggrieved by any transfer shall have the right to test the validity of the same by appropriate action at any time within four years after the change of the use of the water in accordance with such transfer.

(c) *Forms.*

§ 2560. Application for Permit to Appropriate Water.

The State Engineer's Office Must be Notified Immediately When You Complete Your Ditch.

Application for a Permit to Divert and Appropriate the Water of the State of Wyoming.

Water Division No.____ District No.__

I, _____, of_____, County of_____, State of_____, being duly sworn according to law, upon my oath say:

1. The name of the applicant_____
2. The postoffice address of the applicant_____
3. The use to which the water is to be applied is_____
4. The name of the ditch or canal is_____
5. The source of the proposed appropriation is_____
6. The headgate of the proposed ditch or canal is located_____ of Section____, Township____, Range____
7. The said ditch or canal is to be_____miles long and to pass through the following lands (give route by courses and distances, or by naming legal subdivisions crossed):_____
8. The dimensions of said works: (*a*) (At headgate) Width on top (at water-line)____feet; width on bottom____feet; depth of water____feet; grade____feet per mile.

(*b*) Give dimensions at each point where reduced in size, stating miles from headgate: (At____) Width on top (at water-line)__ feet; width on bottom____feet; depth of water____feet; grade____ feet per mile. (At____) Width on top (at water-line)____feet; width on bottom____feet; depth of water____feet; grade____feet per mile. (At____) Width on top (at water-line)____feet; width on bottom____feet; depth of water____feet; grade____feet per mile.

9. Describe the character of proposed works, stating:

1st. The nature of the material to be moved; 2d, number and length of tunnels, if any; 3rd, amount of fluming, if any_____

10. The estimated cost of said ditch is_____Dollars.
11. The land to be irrigated has a total area of_____acres, described as follows: (Give estimated acreage in fractions of subdivisions)_____
12. Construction will begin on proposed works on or before _____, 190__
13. The time required for the completion of ditches and other distributing works is_____year__ from_____, 190__
14. The time required to complete the application of water to the beneficial use stated in this application is_____ year from____, 190__
15. A map of the proposed ditch or canal, prepared in accordance with Chapter 14, R. S. 1899, accompanies this application.

Signed:

_____

The State of Wyoming, }
County of ---------- } ss.

I hereby certify that the foregoing application was signed in my presence and sworn to before me by------this------day of-------. 190--

The State of Wyoming, }
State Engineer's Office. } ss.

This is to certify that I have examined the foregoing application and have returned the same without my approval for the following reasons:------

Witness my hand this------day of------A. D. 190--

State Engineer.

The State of Wyoming, }
State Engineer's Office. } ss.

This is to certify that I have examined the foregoing application and do hereby grant the same subject to the following limitations and conditions:------

Construction of proposed work shall begin within one year from date of approval.

The time for completing the work shall terminate on December 31, 190--

The time for completing the appropriation of water for beneficial use shall terminate on December 31, 190--

The amount of the appropriation shall be limited to one cubic foot per second of time for each seventy acres of land reclaimed on or before December 31, 190--, and the additional volume used for ------purposes on or before said date.

Witness my hand this------day of------, A. D. 190--

State Engineer.

(Endorsed:)

No.----

Application for a Permit to Appropriate the Water of the State of Wyoming.

Division No.------ District No.------

The State of Wyoming, }
State Engineer's Office. } ss.

This instrument was received and filed for record on the----- day of------, A. D. 190--, at--o'clock--M., and duly recorded in Book--of------on page------

---

State Engineer.

§ 2561. Application for Permit to Enlarge Ditch.

Application for a Permit to Divert and Appropriate the Water of the State of Wyoming.

Water Division No.------ District No.------

Enlargement of the------

I,------of------, County of------, State of--------, being duly sworn according to law, upon my oath say:

1. The location and description of the ditch to be enlarged is as follows:

2. The headgate is situated_____of Section____, Township__, Range____

3. Said ditch is_____miles long and passes through the following lands (give legal subdivisions), the same being correctly shown on the map accompanying this application:_____

4. The dimensions of said ditch are: Width on top (at water-line),____feet; width on bottom,____feet; depth of water,____feet; grade,____feet per mile.

5. Said ditch now serves to irrigate the following described land:_____

6. The total area now irrigated from said ditch being__acres.

7. Application is hereby made for permission to enlarge or extend the use of water through the above named and described ditch and to divert and appropriate the water of the State as follows: 1. The name of the applicant_____ 2. The postoffice address of the applicant_____ 3. The use to which the water is to be applied is_____ 4. The name of the ditch or canal is_____ *5. The source of the proposed appropriation is_____and the head of the proposed extension is located_____, Section_____, Township_____, Range_____ 6. The said ditch or canal as enlarged is to be_____miles long and to pass through the following lands (give sections, townships and ranges):_____ 7. The dimensions of said ditch are to be: (*a*) (At headgate) Width on top (at water-line),_____feet; width on bottom____feet; depth of water,_____feet; grade,_____feet per mile. (*b*) Give dimensions at each point where reduced in size, stating miles from headgate: (At____) Width on top (at water-line)____feet; width on bottom____feet; depth of water____feet; grade____feet per mile. (At____) Width on top (at water-line)____feet; width on bottom____feet; depth of water____feet; grade__feet per mile.

8. Describe the character of proposed works, stating: 1st. The nature of material to be moved. 2nd. Number and length of tunnels, if any. 3rd. Amount of fluming, if any_____

9. The estimated cost of said enlargement is_____Dollars.

10. The land to be irrigated has a total area of_____acres, described as follows: (Give estimated acreage in fractions of subdivisions)_____

11. Construction of the proposed enlargement or extension will begin within one year from date of approval of this application.

12. The time required for the completion of enlargement or extension is_____year from_____, 190__

13. The time required to complete the application of water to the beneficial use stated in this application is_____year from _____, 190__

14. A map in duplicate, prepared in accordance with the provisions of Section 35 of the Water Laws, accompanies this application.

Signed: _____

Note.—The statements in the foregoing application must comply with the requirements of Chapter 14, R. S. 1899.

*If the proposed work is to be an extension of the original ditch give the location from the head of the extension by courses and distances from the nearest government corner.

Note.—Before applications for the enlargement of ditches can be approved, the written consent of the owners of such ditches must be secured, and this must accompany the application.

The State of Wyoming, } ss.
County of ---------- }

I hereby certify that the foregoing application was signed in my presence and sworn to before me by------this------day of------, 190----

The State of Wyoming, } ss.
State Engineer's Office. }

This is to certify that I have examined the foregoing application and have returned the same without my approval for the following reasons:------

Witness my hand this------day of------, A. D. 190--

State Engineer.

The State of Wyoming, } ss.
State Engineer's Office. }

This is to certify that I have examined the foregoing application and do hereby grant the same subject to the following limitations and conditions:------

Work will begin within one year from date of approval. The time for completing construction shall terminate December 31, 190-- The time for completing the appropriation of water for beneficial use shall terminate December 31, 190-- The amount of the appropriation shall be limited to one cubic foot per second of time for each seventy acres of land reclaimed on or before------, 190--, and the additional volume applied to------purposes on or before that date.

Witness my hand this------day of------, A. D. 190--

State Engineer.

§ 2562. Application for Permit to Construct Reservoir and Store Water.

Application for a permit to construct the------reservoir, and to store the unappropriated water of the State of Wyoming.

Water Division No.------ District No.------

I,------of------, County of------, State of--------, being duly sworn according to law, upon my oath say:

1. The name of the applicant------
2. The postoffice address of the applicant------
3. The name of stream from which reservoir is to be filled and appropriation made is------
4. The use to which the water is to be applied is------
5. The location of the proposed reservoir will be in Sec.------ T.----N., R.----W., described as follows: (*a*) State whether situated in channel of running stream, and give character of material at outlet:------ (*b*) If not in channel of running stream, state how it is to be filled. If through canal, give name and dimensions:

_____ (c) The construction of dam, the material of which it is to be built and the method of protecting from waves are as follows:__

6. The area of the reservoir is____acres, with maximum depth of____feet and approximate mean depth of water of____feet.

7. The dimensions of dam are: Length on top,____feet. Length on bottom,____feet. Width on top,____feet. Width on bottom,____feet. Depth,____feet. Slope of front,____ Slope of back,____ Height of dam above water-line when full,____feet.

8. The outlet and wasteway, with dimensions of each, are as follows:_____

9. The outlet of the proposed reservoir is located_____of Section____, Township____North, Range____West.

10. The estimated cost of said reservoir is $____

11. Construction will begin on proposed works on or before _____, 190__

12. The time required for the completion of the works is_____ year__ from_____, 190__

Signed:_____

The State of Wyoming, } ss.
County of _____ }

I hereby certify that the foregoing application was signed in my presence and sworn to before me by_____ this_____day of_____, 190____

_____

Note.—The statements in the foregoing application, together with the maps and plans, must comply with the requirements o Chapter 69, Session Laws 1903. No right to use water permanently can accrue until beneficial use has been made under an independent permit, and proof thereof duly made. The water right then becomes appurtenant to the lands irrigated or to the thing to which the water may be beneficially applied.

The State of Wyoming, } ss.
State Engineer's Office. }

This is to certify that I have examined the foregoing application and have returned the same without my approval for the following reasons:_____

Witness my hand this_____day of_____, A. D. 190__

_____
State Engineer.

The State of Wyoming, } ss.
State Engineer's Office. }

This is to certify that I have examined the foregoing application and do hereby grant the same subject to the following limitations and conditions:_____

Construction of proposed works shall begin within one year from date of approval. The time for completing the work shall terminate on December 31, 190__

Witness my hand this_____day of_____, A. D. 190__

_____
State Engineer.

§ 2563. Proof of Appropriation.

Division No._____ Permit No._____ District No._____

Proof of Appropriation of Water.

(In accordance with the provisions of Section 928, Chapter 14, Title 9, Division 1, Revised Statutes of Wyoming, and the regulations of the Board of Control thereunder.)

From_____Tributary_____

1 Q. State your name. A. _____

2 Q. Postoffice address. A. _____

3 Q. Are you the original applicant for Permit No.__? A._____

4 Q. If not, state the date of your securing an interest therein, and the nature of your interest in the works constructed under such permit. A. _____

5 Q. For what purpose is water used? A. _____

6 Q. When did the construction of the_____ditch (or other distributing works described in said permit) begin? A. _____

7 Q. When was it completed? A. _____

8 Q. Give date when water was first beneficially used. A._____

9 Q. What are the dimensions of the ditch (or other distributing works) built under said permit? A. Width on top____ Width on bottom____ Depth____ Grade____

10 Q. Give the legal subdivisions of land owned or controlled by you on which water has been used, and if an appropriation of water for irrigation is claimed, give the acreage which has been irrigated in each legal subdivision, prior to the time of the expiration of your permit. A._____

11 Q. Has the water been used beneficially and land irrigated each year since the expiration of your permit? A._____

12 Q. What crops were grown on this land in 19__? Give estimated acreage of each crop. A. _____

13 Q. During what months is water beneficially used? A._____

14 Q. Give amount of your investment in the construction of ditch and laterals. A. _____

15 Q. Give estimated cost per acre of preparing land for irrigation. A. _____

16 Q. Does the map filed with this permit show correctly the location of diverting works and area of land where water is used? A. _____

The State of Wyoming, }
County of _____ } *ss.*

I, _____, being first duly sworn, do depose and say that I have read the above and foregoing proof of appropriation of water; that I know the contents thereof; and that the facts therein stated are true.

In Witness Whereof, I have hereunto set my hand this ____ day of_____, A. D. 19__

_____

Subscribed and sworn to before me this_____day of____, 19__

_____

Superintendent, Water Division No.__

Report of Superintendent.

I hereby certify and report that I have made an investigation of the works constructed under Permit No.____, described in foregoing proof. I found same to be as stated in proof, except_____

I also certify that this proof has been opened for public inspection in accordance with regulations, and_____

I recommend that said proof be accepted and that certificate of appropriation be issued in accordance with said proof and the tabulation filed.

_____
Supt. Water Division No.__

_____ Wyoming, _____19__

§ 2564. Certificate of Appropriation.

The State of Wyoming.

Certificate of Appropriation of Water.

Certificate Record____Page____

Whereas, _____has presented to the Board of Control of the State of Wyoming proof of the appropriation of water from_____ through the_____Ditch under Permit No.____for irrigation of the lands herein described, lying and being in_____County, Wyoming, and for_____

Now Know Ye, That the Board of Control, under the provisions of Division I, Title 9, Chapters 10 and 14 of the Revised Statutes of Wyoming, 1899, has, by an order duly made and entered on the___ day of_____, A. D. 190__, in Order Record No.__, Page__, determined and established the priority and amount of such appropriation as follows: Name of Appropriator_____; Postoffice Address _____Wyoming. General Priority Number on main stream;____; Priority Number on_____ Amount of Appropriation,____cu. ft. per sec., Date of Appropriation_____; Description of land to be irrigated, and for which this appropriation is determined and established_____

The right to water hereby confirmed and established is limited to irrigation_____and the use is restricted to the place where acquired and to the purpose for which acquired; rights for irrigation not to exceed one cubic foot per second for each seventy acres of land for which appropriation is herein determinedand established._____

In Testimony Whereof, I,_____, President of the State Board of Control, have hereunto set my hand this_____day of_____, A. D. 190__, and caused the seal of said Board to be hereunto affixed.

_____President.

Attest:_____Secretary.

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